(24,537)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 335.

S. C. HOLMES, PLAINTIFF IN ERROR,

vs.

E. S. CONWAY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

INDEX.

	Original.	Print
Notices of appeal in district court	2	1
Judgment of district court	4	2
Order denying rehearing, etc., in district court	6	4
Clerk's certificate, district court	9	6
Appellant's abstract of record	11	7
Petition	12	7
Motion for receiver	14	8
Reply	14	8
Judgment	14	8
Motion for receiver for insuring property	15	8
Motion for insurance policies	15	8
Affidavit of A. E. Hess	15	8
Restraining order	16	9
Sale of premises and confirmation	16	9
Certificate of purchase	16	9
Order appointing receiver	17	9
Order sustaining motion to permit receiver to make collections, etc.	17	9
Motion to require sheriff to execute deed, etc.	17	9

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 25, 1916.

	Original.	Print
Affidavit of C. F. Harder	19	10
Affidavit of S. C. Holmes	19	10
Stipulation as to status of insurance policies	20	11
Order confirming stipulation	20	11
Affidavit of F. H. Harder	21	11
S. C. Holmes	22	12
E. S. Conway	24	13
W. E. Hogueland	26	14
Lucy J. Phillips	27	15
E. S. Conway	28	16
W. E. Hogueland	28	16
Order denying motion, etc	29	16
Application for rehearing	30	17
Affidavit of A. E. Hess	31	17
C. G. Ricker	31	17
Lucy J. Phillips	32	18
Stella M. Holmes	32	18
S. C. Holmes	33	18
A. E. Hess	34	19
Order of argument of motion on rehearing, etc	34	19
Order overruling motion	35	19
Order directing payment to clerk, etc	36	20
Order on motion to require sheriff to execute deed	36	20
Judgment	35	20
Counsel's certificate to abstract of record	38	21
Specifications of error by Harder	39	21
Specifications of error by Holmes	41	22
Appellee's counter abstract of record	43	23
Motion subject of these proceedings	44	23
Affidavits of Lucy J. Phillips, clerk	45	24
Affidavit of E. S. Conway	46	24
Affidavit of W. E. Hogueland	51	27
Certificate of clerk as to records	53	28
Certificate of clerk as to records	54	29
Motion of F. H. Harder for receiver	54	29
Affidavit of F. H. Harder	55	29
S. C. Holmes	56	30
Statement as to recording of original certificate	56	30
Affidavit of E. S. Conway on rebuttal	57	30
W. E. Hogueland on rebuttal	58	31
S. C. Holmes	60	32
A. E. Hess	61	32
Certificate to abstract of appellee	62	33
Order of submission	64	33
Judgment	66	34
Opinion, Burch, J.	68	34
Petition for rehearing by Holmes	80	42
Explanatory statement	95	53
Exhibit A—Memorandum	96	54
Motion for receiver in district court	97	54
Affidavit of E. S. Conway	98	55
Letter, Holmes to Hess, October 14, 1910	99	55

	Original.	Print
Letter, Johnston to Holmes, October 25, 1910...	99	55
Letter, Johnston to Holmes, November 15, 1910.	99	56
Letter, Holmes to Johnston, November 18, 1910.	100	56
Letter, Johnston to Holmes, November 21, 1910.	100	56
Motion for receiver for insuring property, etc., in district court.....	101	57
Affidavit of W. P. Taylor and Thos. W. Plummer	101	57
Letter, Hess to Holmes, November 29, 1910....	102	58
Letter, Holmes to Hess, December 1, 1910.....	102	58
Letter, Holmes to Culver, December 1, 1910....	102*a*	58
Letter, Hess to Holmes, December 5, 1909.....	102*b*	59
Letter, Holmes to Hess, December 5, 1910.....	102*c*	59
Letter, Holmes to Hess, December 31, 1910.....	103	59
Letter, Holmes to Hess, December 31, 1910.....	103	59
Letter, Holmes to American Insurance Co., January 3, 1911.....	103	59
Letter, Hess to Holmes, January 4, 1911.....	103*a*	60
Motion to require deposit with clerk.....	104	60
Agreement as to insurance, etc.....	104	60
Affidavit of A. E. Hess.....	104	61
Letter, Holmes to Foust, January 7, 1911.....	104½	61
Letter, Foust to Holmes, January 7, 1911.....	104½	61
Order on motion to require deposit with clerk.	105	62
Letter, Holmes to Foust, January 14, 1911.....	105½	62
Stipulation as to status of insurance policies...	106	63
Letter, Holmes to Foust, January 27, 1911.....	106½	63
Receipt	107	64
Letter, Holmes to Hess, February 25, 1911.....	108	64
Check, Holmes to Hess, February 25, 1911.....	109	64
Letter, Hess to Holmes, March 1, 1911.....	110	64
Receipt	111	65
Letter, Holmes to Hess, April 5, 1911.....	112	65
Check, Holmes to Hess, March 31, 1911.....	113	65
Affidavit of S. C. Holmes.....	114	65
Exhibit B—Clerk's certificate as to date, etc.....	115	66
Affidavit of S. C. Holmes.....	116	67
etition for rehearing by Harder.....	119	68
rder denying petitions for rehearing.....	127	73
pinion on petitions for rehearing.....	129	73
lerk's certificate	139	80
etition for writ of error, assignment of errors, and prayer....	141	81
rder allowing writ of error.....	142	81
rit of error.....	143	82
ond on writ of error.....	145	83
itation and service.....	147	84
ertificate of lodgment.....	148	84
lerk's return to writ of error.....	149	85

Be it remembered, that on May 31st 1913, there was filed in the office of the clerk of the suprome court of the state Kansas, notices of appeal duly served, and journal entry of judgnt which notices of appeal and Journal entry of judgment are in e words and figures as follows, towit:

Filed May 31, 1913. D. A. Valentine, Clerk Supreme Court.

In the District Court in and for Woodson County, Kansas.

18792.

A. E. Hess, Plaintiff,
vs.
E. S. Conway et al., Defendants.

Notice of Appeal.

A. E. Hess, E. S. Conway, and Lamb & Hogueland, his attorneys record, and S. C. Holmes, are hereby notified and will take notice at C. F. Harder appeals from all findings, orders, decisions and dgments made and entered herein, and especially from the findgs, orders, decisions and judgments made and entered herein ugust 30, 1912, and April 30, 1913, and each and every part and rtion thereof.

Dated this 26" day of May, 1913.

C. F. HARDER,
S. C. HOLMES,
Att'y for C. F. Harder.

Service of the above notice made upon us and by us accepted, and copy thereof received by us, this 26" day of May, 1913.

LAMB & HOGUELAND,
Att'ys for E. S. Conway.

Service of the above and foregoing notice made upon me, and me accepted, and a copy thereof received by me, this 26" day May, 1913.

S. C. HOLMES.

Filed May 29, 1913. Lucy J. Phillips, Clerk Dist. Court.

3 In the District Court in and for Woodson County, Kansas.

A. E. HESS, Plaintiff,
vs.
E. S. CONWAY et al., Defendants.

Notice of Appeal.

A. E. Hess, C. F. Harder, E. S. Conway, and Lamb & Hogueland, attorneys of record for E. S. Conway, will take notice and are hereby notified that S. C. Holmes hereby appeals from that part and portion of the findings, orders, decisions and judgment made and entered herein April 30, 1913, relating to the said S. C. Holmes, and ordering and adjudging the said S. C. Holmes to pay into said court $1,075.00 and interest.

Dated this 27″ day of May, 1913.

S. C. HOLMES,
Att'y for Himself.

Service of the above notice made upon us and by us accepted, and a copy thereof received by us, this 27″ day of May, 1913.

LAMB & HOGUELAND,
Att'ys for E. S. Conway.

Service of the above notice made upon me and by me accepted, and a copy thereof received by me, this the 27″ day of May, 1913.

C. F. HARDER.

Filed May 29, 1913. Lucy J. Phillips, Clerk Dist. Court.

4 In the District Court of Woodson County, Kansas, Thirty-seventh Judicial District.

No. 3413.

A. E. HESS, Plaintiff,
vs.
E. S. CONWAY et al., Defendants.

Journal Entry.

Be it remembered that on the 30th day of August, 1912, this cause coming on further to be heard upon the motion of C. F. Harder, the holder of the certificate of purchase of real estate sold herein under and pursuant to the judgment rendered herein, asking for an order herein directing the Sheriff of Woodson County, Kansas, to execute deed herein to said C. F. Harder and for writ of assistance to put the said C. F. Harder in possession of such real estate so sold—for reasons in said motion set forth—said C. F. Harder appear-

ing by S. C. Holmes, his Attorney, and defendant E. S. Conway, the defendant, and who claims to have redeemed such lands as the owner thereof appearing by Lamb & Hogueland, his Attorneys; thereupon, by consent of parties, the aforesaid motion was heard by the Court at Chambers at the City of Iola, Allen County, Kansas, on September 5th, 1912, and the Journal Entry of order and decree of such motion to be filed as of August 30th, 1912; and thereupon, on September 5th, 1912, pursuant to such agreement, the said C. F. Harder offered in support of his said motion, the records, files and Journal Entries in this cause and also affidavits of C. F. Harder and S. C. Holmes, filed herein August 30th, 1912; and the defendant E. S. Conway, in resistance of such motion, offered in evidence the affidavits of W. E. Hogueland, Lucy J. Phillips, E. S. Conway, and a second affidavit of W. E. Hogueland and likewise a second affidavit of E. S. Conway, all filed herein September 4th, 1912, and affidavits of S. C. Holmes dated October 20th, 1911, and affidavit of F. H. Harder, dated May 29th, 1911, filed herein June 1st, 1911, and receipt dated March 31st, 1911, of S. C. Holmes to W. E. Hogueland for $575.00; said C. F. Harder also introduces the affidavit of F. H. Harder dated September 5th, 1912, filed herein September 5th, 1912; certificate of Lucy J. Phillips, Clerk of the above entitled Court, dated the 3rd of September, 1912, and thereupon said motion was argued by respective Counsel and submitted to the Court. After due consideration of the records, files, judgment, orders and decrees, the order of sale and return and all the evidence introduced by the affidavits and certificates filed herein, I find that the motion of the said C. F. Harder should be overruled and denied.

It is therefore ordered, adjudged and decreed, That the motion of C. F. Harder for an order directing the Sheriff to execute and deliver to him deed and for writ of assistance herein be and the same is hereby overruled and denied, to which order and judgment the said C. F. Harder duly excepts:

It is further ordered and directed, That this Journal Entry be entered and filed pursuant to agreement as of August 30th, 1912, and to the end that the said C. F. Harder may be protected in the right to review such order if he so desires, he may file an application for a re-hearing of such motion as of a date within three (3) days from said date, to-wit: August 30th, 1912.

OSCAR FOUST, *Judge.*

Filed Aug. 30, 1912. Lucy J. Phillips, Clerk Dist. Court.

6 In the District Court of Woodson County, Kansas, Thirty-seventh Judicial District.

No. 3413.

A. E. Hess, Plaintiff,
vs.
E. S. Conway et al., Defendants.

Journal Entry.

Be it remembered that on the 17th day of February, 1913, being a regular judicial day of the regular November term, 1912, of the above entitled court, this cause coming on to be heard on the motion filed by C. F. Harder for a re-hearing on his motion filed in this cause on the 12th day of August, 1912, and thereupon by consent of the court, this cause was re-argued upon the motion of C. F. Harder filed herein August 12th, 1912, asking an order herein directing the sheriff of Woodson County, Kansas, to execute and deliver to him, said C. F. Harder, a deed for lands sold herein under order of sale, for the reasons in said motion stated; C. F. Harder present by S. C. Holmes and Honorable C. W. Shinn, his attorneys; the defendant E. S. Conway present by Lamb & Hogueland, his attorneys; thereupon such motion coming on for hearing and in support thereof, the records, files and journal entries in said cause together with all affidavits introduced upon the hearing heretofore had upon this motion on behalf of said C. F. Harder, as well as the further testimony, to-wit: Affidavit of F. H. Harder filed herein September 5th, 1912; affidavit of S. C. Holmes filed herein September 5th, 1912; affidavit of C. G. Ricker and affidavit of S. C. Holmes filed herein December 23rd, 1912; and affidavits of A. E. Hess, Lucy J. Phillips, Stella M. Holmes, and S. C. Holmes filed herein February 17th, 1913; and likewise, affidavit of C. F. Harder with copy certificate of purchase and assignment endorsed thereon attached, filed herein February 17th, 1913. The foregoing being the testimony introduced by C. F. Harder in support of his motion; and, in resistance thereof, in addition to the affidavits heretofore filed herein, the following other and further affidavits filed herein were introduced, to-wit: Certificate of Lucy J. Phillips filed herein
7 September 3rd, 1912; two affidavits of W. E. Hogueland; two affidavits of E. S. Conway, defendant; and affidavit of Lucy J. Phillips filed herein September 4th, 1912; also verified answers and interrogatories of A. E. Hess filed herein November 22nd, 1912; thereupon such motion was argued, submitted to and taken under advisement by the court.

Be it further remembered that on this 30th day of April, 1913, being a regular judicial day of the regular March term, 1913, of the above entitled court, this cause coming on for decision upon the motion heretofore argued and submitted as above set forth; said C. F. Harder present by S. C. Holmes, his attorney, and the defend-

ant E. S. Conway present by his attorneys, Lamb & Hogueland, and the court having duly considered the records, files, journal entries and affidavits filed herein and introduced upon hearing of such motion and being fully advised in the premises, finds that such motion of said C. F. Harder should be overruled and denied—to which finding he, said C. F. Harder duly excepts.

And further finds that in justice and equity, it should be ordered and directed that within thirty (30) days from this date, to-wit: April 30th, 1913, A. E. Hess, plaintiff in the above entitled action, and S. C. Holmes, his attorney of record, be ordered and directed to return to and deposit in the office of the clerk of this court, the sum of One Thousand and Seventy-five ($1,075.00) Dollars, together with interest upon Five Hundred ($500.00) Dollars thereof at the rate of ten (10%) per cent from February 25th, 1911, to day of payment of same into the office of the clerk of this court; and upon Five Hundred and Seventy-five ($575.00) Dollars thereof, interest at the aforesaid rate, from March 31st, 1911—being the date of payment of same to said S. C. Holmes—to the time such moneys are paid into the office of the clerk of this court pursuant to order herein made, for the use and benefit of the holder of such certificate of purchase, to-wit: C. F. Harder; to which finding, A. E. Hess, plaintiff in the above entitled action and S. C. Holmes, his attorney of record, separately, duly except.

It is therefore considered, ordered, adjudged and decreed, that the motion of C. F. Harder for an order upon the sheriff of
8 Woodson County, Kansas, to execute and deliver to him, deed for the lands sold herein be and the same is hereby overruled and denied, to which said C. F. Harder duly excepts.

It is further considered, ordered, adjudged and decreed, that the plaintiff A. E. Hess and S. C. Holmes, his attorney of record, within thirty (30) days from this date, to-wit: (April 30th, 1913), on or before the thirtieth (30th) day of May, 1913, return to and deposit in the office of the clerk of this court, the sum of One Thousand and Seventy-five ($1,075.00) Dollars, together with interest at the rate of ten (10%) per cent per annum upon Five Hundred ($500.00) Dollars thereof, from the 25th day of February, 1911, down to the day upon which they pay the said sum into the office of the clerk of this court; and upon the sum of Five Hundred and Seventy-five ($575.00) Dollars thereof, with interest from March 31st, 1911, down to the day such sum is paid into the office of the clerk of this court at the aforesaid rate, such moneys so deposited in connection with the Seven Hundred and Thirty-eight and three one-hundredths ($738.03) Dollars now still on deposit in the office of the clerk of this court aforesaid as redemption money to be used in the redemption and cancellation of certificate of purchase issued by the sheriff of Woodson County, Kansas, to A. E. Hess, plaintiff herein. To all of which A. E. Hess, plaintiff in the above entitled action, and S. C. Holmes, attorney of record, separately, duly except.

It is further considered, ordered, adjudged and decreed, that C. F.

Harder pay costs incurred in this action in the filing of his motion and affidavits herein, taxed at $4.50; and

It is further considered, ordered, adjudged and decreed, that the plaintiff A. E. Hess pay all other costs incurred in and about the filing of affidavits in connection with the motion herein disposed of, taxed at $3.15. To which both parties except so far as is adverse to him.

It is further considered, ordered, adjudged and decreed, that this cause be reserved for such orders and decrees as may be necessary to carry into effect the orders herein made. For all of which judgment is not rendered.

9 The foregoing journal entry was prepared by the court, and the exceptions therein noted were noted by the court upon its own motion in accordance with a rule of practice of this court to note exceptions for the parties to each adverse ruling, order and judgment of the court.

(See memorandum filed herein this day in connection with opinion filed herein August 30th, 1912.)

OSCAR FOUST, *Judge.*

(Filed April 30, 1913.)

STATE OF KANSAS,
37th Judicial District, Woodson County, ss:

I, Lucy J. Phillips, Clerk of the District Court of the 37th Judicial District of the State of Kansas, sitting within and for the county aforesaid, do hereby certify the above and foregoing to be a true, full and complete copy of Notice of Appeal filed by S. C. Holmes, and Notice filed by C. F. Harder, and copy of Journal Entry of April 30, 1913 and Journal Entry of August 30, 1912, in the therein entitled cause as the same remains on file and of record in my office.

Witness my hand and the seal of said Court, affixed at my office in Yates Center, this 29″ day of May, A. D. 1913.

[SEAL.] LUCY J. PHILLIPS,
Clerk of District Court.

Endorsed: No. 18792. District Court, Woodson County, Kansas. A. E. Hess, Appellee, vs. E. S. Conway et al., Appellants. Filed May 31 1913. D. A. Valentine, Clerk Supreme Court.

10 Be it remembered, that on August 29th, 1913, there was filed in the office of the clerk of the supreme court of the state of Kansas, appellant's abstract of the record, which abstract of the record is in the words and figures following to-wit:

11 Filed Aug. 29 1913. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of Kansas.

No. 18792.

A. E. HESS (C. F. HARDER and S. C. HOLMES, Appellants)
vs.
E. S. CONWAY et al., Appellees.

ABSTRACT OF APPELLANTS.

C. W. Shinn, Neodesha, Kansas; S. C. Holmes, Yates Center, Kansas, Att'ys for C. F. Harder and S. C. Holmes, Appellants.

12 In the Supreme Court of Kansas.

No. 18792.

A. E. HESS (C. F. HARDER and S. C. HOLMES, Appellants)
vs.
E. S. CONWAY et al., Appellees.

Abstract of Appellants.

September 14, 1910, A. E. Hess as plaintiff, filed in the District Court of Woodson County, Kansas, his certain petition against E. S. Conway, Bert Miller and wife, (Miller and Miller being tenants) to recover on a certain promissory note, dated June 4, 1910, in
13 the sum of $2,500.00, due in sixty days with interest at ten per cent per annum from date, and to foreclose two certain warranty deeds, treated as mortgages, given to secure said note, one conveying the following described real estate, to wit:

All that certain piece, tract or parcel or tract of land situated and being in the northeast quarter of the northwest quarter of section seven (7), township twenty-five (25), range sixteen (16), Woodson County, Kansas, and described as follows, to wit:

Beginning at a point marked by a sandstone corner-stone with a cross mark in the top of said stone, which said corner-stone is fifty feet south of the center of the main track of the Missouri Pacific railroad, Wichita Division, commonly known as the St. Louis, Fort Scott & Wichita railroad, and one hundred feet west of the center of the main track of the Kansas, Colorado & Pacific Railway Company, thence almost due south along said right-of-way of said Kansas, Colorado & Pacific Railway Company one hundred and ten feet to a sandstone corner-stone described and marked by a cross in the top, thence west about sixteen rods to the right-of-way of said Ft. Scott & Wichita railroad, thence northeast along the right-of-way of said Ft. Scott & Wichita Division of the Missouri Pacific Railway to the place of beginning.

The other deed conveying the following described real estate, to wit:

All that tract of land lying in the sixth addition to Yates Center lying west of a tract deeded to W. A. Taylor and T. T. Davis by Abner M. Yates and wife, and between the right of way of St. Louis, Ft. Scott & Western Ry., and Rutledge Street in said sixth addition to Yates Center, Kansas.

14 Said deeds were each the ordinary warranty, and each bearing date June 4, 1910, executed by E. S. Conway, a single man, to A. E. Hess, filed for record August 6, 1910, and recorded in Vol. 46 of Deeds at pages 395-6 in the office of the Register of Deeds in and for Woodson County, Kansas.

Said petition being the ordinary petition for suit on a note and foreclosure of a mortgage, and a personal judgment was asked against E. S. Conway.

Bond for cost was regularly filed and approved and summons was issued in the manner and form provided by law and served upon all defendants.

September 22, 1910, answer was filed by E. S. Conway, admitting the allegations of plaintiff's petition, and that said deed was given to secure said note and asking for eighteen months' redemption.

October 1, 1910, motion was made by A. E. Hess for the appointment of a receiver, on the grounds, among other things, that said property was not insured; which motion was by the court overruled, with leave to the plaintiff to renew the same, at a hearing had thereon October 8, 1910.

October 21, 1910, reply was filed by A. E. Hess through his attorney, S. C. Holmes, the same being a general denial.

November 16, 1910, a trial was had in said cause, and a personal judgment entered in favor of the plaintiff, A. E. Hess, and
15 against the defendant, E. S. Conway, in the sum of $2,612.00, the same to bear interest at ten per cent from said date until paid; and a further judgment foreclosing said mortgage, as provided by law, sale without appraisement, subject to eighteen months' right of redemption.

November 23, 1910, motion was filed by said plaintiff asking for the appointment of a receiver for the sole purpose of insuring said property; and November 30, 1910, said motion was overruled, with leave to renew the same if the circumstances required it.

January 9, 1911, a motion was filed in said court to require the said defendant, E. S. Conway, to deposit with the clerk of said court the insurance policy upon the hotel at Yates Center, Kansas, and to pay into court any moneys received from said insurance. (The hotel located upon the real estate in Yates Center above described was destroyed by fire on or about December 30, 1910.)

Said motion above mentioned was supported by the affidavit of A. E. Hess, plaintiff, which is in substance:

That he was informed of the destruction of the hotel property by fire, that the remainder of said property covered by said deeds would not sell for sufficient sum to pay said judgment, and that the said E. S. Conway, defendant, verbally agreed with plaintiff to carry

$1,500.00 insurance upon said properties for the benefit of said plaintiff, and that said agreement was part of the consideration for said loan.

16 January 9, 1911, said judge made an order in said cause and had the same filed restraining and enjoining the said defendant Conway from in any manner disposing of said insurance policies upon the buildings on said mortgaged premises, or disposing of any moneys collected, and fixing January 16, 1911, for the hearing of said motion; which order was duly served on said defendant E. S. Conway.

January 19, 1911, order of sale in the manner and form provided by law having regularly issued out of said court, all the real estate covered by said deeds described herein was sold in the manner and form provided by law to A. E. Hess, plaintiff, for the sum of $1,700.00, he being the highest and best bidder therefor; and on the 6th day of February, 1911, said sale was by said court duly approved and confirmed.

Certificate of purchase was duly issued in the manner and form provided by law, bearing date January 19, 1911, to A. E. Hess, plaintiff, conveying all the real estate mentioned and described in said petition, in consideration of $1,700.00, the taxes and costs noted thereon being $68.64; which said certificate on said 19th day of January, 1911, was duly assigned in the manner and form provided by law by the said A. E. Hess to one C. F. Harder in consideration of $1,700.00; which said certificate was duly filed for record and recorded in the office of the Register of Deeds in and for Woodson County, Kansas, on the 24th day of August, 1912.

17 June 1, 1911, F. H. Harder, by his attorney S. C. Holmes, moved the court for the appointment of a receiver with power to write insurance on the hotel property at Durand, Kansas; which said motion is supported by the affidavit of F. H. Harder that he is the owner of said sheriff's sale certificate, that he desires to have said property insured and that it cannot be done without the appointment of a receiver; which said motion is by the court sustained on the 31st day of May, 1911, and Stella M. Holmes was appointed receiver and qualified.

October 23, 1911, motion was made by F. H. Harder by his attorney, S. C. Holmes, to permit the receiver to collect sufficient rents to pay said insurance and make needed repairs. Which said motion is supported by affidavit of S. C. Holmes, which states in substance that he is attorney for F. H. Harder, the owner of said certificate of purchase, and that the said F. H. Harder has advanced $25.80 to pay said insurance. Said motion is also supported by the affidavit of one Crossland, which shows in substance that repairs are necessary; which said motion was by the court sustained.

August 12, 1912, C. F. Harder filed in said court his motion, which, caption omitted, is in the words and figures as follows, to wit:

Comes now C. F. Harder, by S. C. Holmes, his attorney, and
18 moves the court for an order requiring said sheriff to execute deed herein, and for writ of assistance and an order requiring said sheriff to put the said C. F. Harder in possession of the real estate

heretofore sold herein by said sheriff, for the following reasons, to-wit:

1. Said C. F. Harder is the owner and holder of the certificate of purchase heretofore issued herein by said sheriff upon the sale of said real estate.

2. No redemption has been had, as provided by law, no moneys paid to said purchaser, nor has the sum provided by law for redemption been paid into court for the holder of said certificate.

3. Said sheriff without authority of law has refused and still refuses to execute sherfff's deed to said purchaser, as provided by law, and to put said purchaser in possession, although demanded so to do.

S. C. HOLMES,
Att'y for C. F. Harder.

August 30, 1912, a hearing was had upon said motion before the Hon. Oscar Foust at Iola, Kansas, notice of said hearing having been regularly given to said defendant E. S. Conway.

Upon the hearing of said motion, the said C. F. Harder offered the following evidence, to wit:

The files and record in the above entitled cause.

A true and correct copy of the certificate of purchase made to A. E. Hess and assigned to C. F. Harder.

19 Affidavit of C. F. Harder, which is in substance as follows: That on January 19, 1911, he became the absolute owner of the certificate of purchase, executed by said sheriff to A. E. Hess, paying therefor $1,700.00, on said date and the same being assigned on said date to him. That he has not been reimbursed for the amount paid for said certificate, nor has anyone paid into the office of the clerk of said court for him a sufficient sum to redeem said property, as provided by law, and that on or about the first day of August, 1912, he made a demand upon said sheriff for a sheriff's deed to said property included in said certificate of purchase, and the same was refused by the said sheriff. That said certificate was duly recorded in the office of the Register of Deeds in and for Woodson County, Kansas, August 24, 1912, in Miscellaneous G at page 191. That he now demands a deed to the premises described in said certificate and is willing to surrender said certificate on the execution of the same.

Affidavit of S. C. Holmes, which is in substance as follows:

That he was the attorney for the plaintiff Hess in the above entitled cause. That on or about December 30, 1910, one of said hotel properties was destroyed by fire and he immediately notified the insurance companies that Mr. Hess claimed certain rights by reason of the execution of said deed and the foreclosure of the same, and that about said time said court made an order with reference to policies of insurance and fixed a time for hearing the same; that pending said time an agreement was made between W. E. Hogueland, representing Mr. Conway, and affiant, with reference to said insurance; the reason urged by Mr. Hogueland for desiring said agree-

20 ment was that it was better for all parties concerned to have no controversy over the insurance. Said agreement was that

the moneys received on said insurance, or a sufficient sum thereof to pay the said Hess, plaintiff herein, would be paid to affiant for the said Hess to satisfy the balance due on said judgment. Affiant prepared, and signed as he believes, and delivered to the said Hogueland, the following stipulation:

In the matter of the motion and order heretofore made and served upon defendant E. S. Conway herein with reference to the insurance upon the hotel property in Yates Center, Kansas, it is hereby stipulated and agreed by and between the parties hereto and their attorneys of record that said insurance policies be and remain deposited with the clerk of said court until said insurance is paid; which said insurance money is to be paid to the clerk of said court, and a sum paid to A. E. Hess or his attorney sufficient to pay the balance remaining due upon said judgment above the purchase price of said real estate, and the remainder of said insurance, if any, after the payment of costs and expenses herein, to be paid to E. S. Conway or his attorney.

The Judge of said court is hereby authorized by consent of said parties to make an order herein, under date of January 16, 1911, in keeping with said stipulation, and for the protection and guidance of all parties.

Dated this 16th day of January, 1911.

That in keeping with said agreement he received from the clerk of said court February 25, 1911, $500.00, the receipt executed therefor being as follows:

"February 25, 1911.

Received of clerk of court $500.00 to apply on said judgment.

S. C. HOLMES,
S."

21 That said money was received for the said Hess, would not have been received in any other manner, and was remitted to the said Hess. That in keeping with said agreement, the said W. E. Hogueland delivered to the said Holmes a draft in the sum of $575.00, from the insurance company, payable to the order of E. S. Conway, C. S. Holmes and A. E. Hess, the same having been endorsed by the said Conway, and received from the said Holmes a receipt as follows, to wit:

"YATES CENTER, KANSAS, March 31, 1911.

Received of W. E. Hogueland Five Hundred Seventy Five Dollars in payment of Ins Conway matter Apply on judg. Hess vs Conway $575.00

S. C. HOLMES"

That said money was received by him as attorney for the said Hess, and in keeping with said agreement, and would not have been received in any other manner, and was remitted to the said Hess; and had not said agreement been made he would have instituted proceedings to recover said money, as the said Hogueland well knew. That the said Hogueland was notified by said stipulation of the manner in

which said moneys were treated, and said stipulation, which was not returned to affiant, should be filed in said cause.

That subsequent to the filing of said motion herein August 12, 1912, he has represented C. F. Harder, the owner of said certificate, and has made a demand upon said sheriff for a sheriff's deed, and the same has been refused. That the said Harder became the owner of said certificate January 19, 1911, paying therefor $1,700.00.

Affidavit of F. H. Harder, which is in substance as follows:

22 That he has read the affidavit of E. S. Conway with reference to the conversation the said Conway claims to have had with affiant, and that he never stated that Hess had nothing further to do with the judgment, or had received all of his money; had no such conversation. That they had no attorney employed in this case, that the said S. C. Holmes did not represent them. That the first thing done by the said S. C. Holmes for them was in the matter of obtaining insurance on the Durand property. That said certificate was purchased by and assigned to his father, C. F. Harder, on the day of sale, and that affiant made a check to the said sheriff for the payment of costs of about $65.00. That the said Conway has never asked affiant anything about the ownership of said certificate, nor has he made any statement with reference thereto, nor did the said Conway ever make any statement about the affairs between himself and Hess. That C. F. Harder purchased said certificate, but did not purchase the remainder of said judgment. That the said S. C. Holmes was never authorized to accept any money in redemption of said property for himself or C. F. Harder, nor has the said C. F. Harder received any money in the redemption of said certificate.

Affidavit of S. C. Holmes in substance as follows:

That he has read the affidavit of E. S. Conway. That he was not attorney for the said C. F. Harder in the reception of any moneys paid herein, nor did he have any authority from the said Harder to receive it, nor did he receive it for C. F. Harder or F. H. Harder, but received it for the plaintiff A. E. Hess, as the said W. E. Hogueland well knew.

That prior to the filing of the motion herein to require the sheriff to execute deed to the said C. F. Harder, the only instance in which he represented said Harder in said cause was in and about

23 the insurance on the Durand property. That he had made no concealment of said certificate, in fact, made no statement with reference thereto. That the said Conway came to his office, informed him that he had redeemed said property, paid for the policy of insurance then in force, and affiant, believing his statement and relying upon it, delivered said policy to him.

That he has read the affidavit of W. E. Hogueland. That the said Hogueland never informed affiant at any time that said moneys were to be applied in the redemption of said property, but stated to and agreed with affiant that it was to be applied to the payment of the balance due on the judgment in favor of the said Hess, well knowing that said affiant was making an effort to collect the

balance of said judgment, and affiant only agreed to permit the money to come to the hands of the said Hogueland with the distinct understanding and agreement that it was to be paid to affiant for the said Hess, and it was so paid and so received. Said draft was for the sum of $575.00, payable to the order of Conway, Hess and Holmes; that affiant had no interest in the matter except to follow the instructions of the plaintiff, and that the filing of the affidavit by the said Hogueland is the first intimation that affiant ever had that any other or different arrangement was claimed. That the original stipulation, copied in a former affidavit of affiant, was left with the said Hogueland.

Certificate of the clerk of said court, which, caption omitted, is in the words and figures as follows:

I, Lucy J. Phillips, clerk of said court, hereby certify that on or about February 24, 1911, there was paid into my court in the above entitled case $500.00, and that on or about July 15, 1912, there was paid into my office the sum of $738.03.

I further certify that no other moneys have been paid
24 into my office, or into my hands, in the above entitled cause.

Witness my hand and the seal of said court this the 3rd day of September, 1912.

[SEAL.] LUCY J. PHILLIPS,
Clerk District Court.

On the hearing on said motion to require the sheriff to execute deed to the said C. F. Harder, said defendant E. S. Conway offered the files and records in said case and certain affidavits, among which was the affidavit of himself, in substance as follows, to-wit:

That on the 16th day of November, 1910, plaintiff obtained a judgment against him in the sum of $2,620.00 and the foreclosure of a certain deed declared as a mortgage upon the real estate described in plaintiff's petition, and above described herein. That an order of sale was issued December 14, 1910, and said property sold to the plaintiff for the sum of $1,700.00; that there were certain buildings upon the property in Yates Center, Kansas, and the same were destroyed by fire, and said defendant had insurance on the same and collected $1,075.00 and applied the same to the redemption of all properties sold to plaintiff, and afterwards paid the balance necessary to redeem said property with interest, cost, taxes and insurance. That said $1,075.00 was paid by plaintiff's attorneys, Lamb & Hogueland, duly authorized and instructed to apply the same to the redemption of said property. That $500.00 of said sum was paid to the clerk of the District Court, and the following receipt taken, which, caption omitted, is as follows, to wit:

"YATES CENTER, KANSAS, Feb. 24, 1911.

Received of Lamb & Hogueland the sum of $500.00, the same being in part payment of the redemption in the above en-
25 titled cause.

LUCY J. PHILLIPS."

That the said sum of $575.00 was sent to S. C. Holmes, the duly authorized and acting attorney for both the plaintiff and C. F. Harder by Lamb & Hogueland. That he afterwards caused the balance of said redemption money, interest, taxes and costs to be paid to the clerk of the District Court of Woodson County, amounting to $738.03, and received a receipt therefor; which receipt, caption omitted, is in the words and figures as follows, to wit:

"YATES CENTER, KANSAS, July 15, 1912.

Received of E. S. Conway the sum of $738.03, the same being in full of the balance of redemption of the land in the above entitled cause.

LUCY J. PHILLIPS,
Clerk District Court."

That after the redemption, the said S. C. Holmes, attorney for C. F. Harder, turned over the insurance policy on the Durand property to affiant, with full knowledge of the redemption and made no objection. That after the first two payments, the said Conway had a talk with F. H. Harder, who represented his father, informed him that he had paid $1,075.00 to the said Holmes in redemption of said property and no objections were made thereto; and affiant informed him that the said Hess was indebted to the said defendant and he wanted to collect it if he could; said F. H. Harder stated that Hess had nothing to do with the judgment as he had received all his money. That shortly before paying the balance of the redemption money, he had a talk with S. C. Holmes and asked him the amount necessary to redeem, and the said Holmes directed him to go — the clerk of said court.

That the said C. F. Harder, S. C. Holmes and F. H.
26 Harder, after obtaining the assignment of said certificate of purchase, concealed the instrument and kept it off the record and stated that F. H. Harder was the owner, and C. F. Harder never disclosed that he was the owner of the certificate until after the redemption, when he placed the assignment of record August 24, 1912. That he has been unable to locate the whereabouts of plaintiff and obtain his testimony. That A. E. Hess had no claim upon the insurance money of $1,075.00, as the same was received and the insurance paid for by affiant. That he had agreed that the sum of $1,075.00 should be applied in redemption of said property and had authorized his attorneys, Lamb & Hogueland, to make such agreement with S. C. Holmes, attorney for plaintiff, C. F. Harder and F. H. Harder.

Affidavit of W. E. Hogueland, in substance, as follows:

I am a member of the law firm of Lamb & Hogueland, and we were attorneys for E. S. Conway in the above entitled case. That some time after the sale in the above entitled case, affiant was informed that S. C. Holmes was about to commence additional proceedings against Conway and the insurance company. That at said time the said Conway was endeavoring to effect a settlement or compromise with said insurance company for his loss, and when

affiant informed the said E. S. Conway of the further action to be taken by the said Holmes, he was informed by the said Conway that he intended to apply all of said money in the redemption of his property.

That affiant called the said S. C. Holmes by phone and told him in substance what Mr. Conway had said, and the said Holmes replied that if affiant would personally see that the money was turned over, the matter would be satisfactory, and affiant agreed to it. That when the $500.00 was received he caused the same to be paid to the clerk of the District Court and took the receipt therefor set
27 out in the affidavit of E. S. Conway.

That there was some delay with reference to the additional payment of $575.00, and that S. C. Holmes called affiant over the phone with reference thereto a number of times. That on March 31, 1911, affiant sent the draft therefor to the office of the said S. C. Holmes by messenger, and received his receipt for the same.

That affiant had no interest in the matter except to observe the instructions of the said Conway and keep his agreement with the said Holmes. That affiant had no knowledge that the said Holmes ever denied or claimed that said money was not paid in the redemption of said property until two or three days after the period of redemption had expired, and that he heard from outside rumor.

The affidavit of Lucy J. Phillips, which, caption omitted, is in the words and figures as follows, to wit:

Lucy J. Phillips, being first duly sworn, deposes and says: That she is the clerk of the District Court of Woodson County, Kansas. That she has examined the files and records in said above case and finds therefrom:

That on the 16th day of November, 1910, plaintiff recovered a judgment against E. S. Conway for $2,612.00 with 10 per cent interest and obtained foreclosure upon the land described in plaintiff's petition.

That on the 14th day of December, 1910, an order of sale was issued for said property.

That on the 19th day of January, 1911, said property was sold to A. E. Hess, the plaintiff, for the sum of $1,700.

That on the 24th day of February, 1911, E. S. Conway paid to me as such clerk the sum of $500 to apply on redemption of said premises.

28 That on the 15th day of July, 1912, E. S. Conway presented to me a receipt for $575 signed by S. C. Holmes and stating it was in payment of insurance in Conway matters, dated March 31, 1911, and which said Conway informed me was paid on redemption of said property.

That on July 15th, 1912, said E. S. Conway paid to me $738.03 to redeem said property, and said sums being the full amount with interest necessary to redeem said property, I issued to said E. S. Conway a receipt showing that said property had been redeemed.

LUCY J. PHILLIPS.

Subscribed and sworn to before me this 4th day of Sept., 1912.
[SEAL.] M. E. PAYNE,
Notary Public.

Com. Ex. Jan'y 27th, 1914.

Affidavit of E. S. Conway, in substance, as follows:
That he has read the affidavit of S. C. Holmes and C. F. Harder filed herein. That he never heard of the stipulation mentioned, never consented to or authorized the said Hogueland to make any such stipulation. That he had no knowledge whatever that anyone but the plaintiff owned said sale certificate until F. H. Harder applied for a receiver, and he and S. C. Holmes made affidavit that F. H. Harder owned the same; which affidavits bear date May 29, 1911. That when affiant authorized the said Hogueland to apply the proceeds of said insurance, he expected the same to be applied to save his property; that the property was worth $3,500.00 and sold for $1,700.00.

Affidavit of W. E. Hogueland, in substance, as follows:
That he has read the affidavit of S. C. Holmes. That he has no recollection of the presentation of said stipulation or ever having seen it. That he never had any authority to apply said in-
29 surance money to the excess judgment of plaintiff. That after said fire, in which certain buildings belonging to defendant Conway were burned, the adjuster came to the office of affiant and stated that he had been to the courthouse and investigated the records and the insurance was void, and left without making an adjustment. That affiant was informed that prior to the coming of the adjuster, S. C. Holmes was making a claim for said insurance.

That after the adjuster had refused settlement, affiant began negotiations to compromise with the insurance company. That being informed that the said Holmes was about to commence some kind of a proceedings to collect said insurance, and realizing that if the matter got into court no one could recover, as by the terms of the policies they were void, after talking with Conway, he called Holmes by phone and said to him, in substance, that no legal proceedings would be necessary, that Conway intended to apply everything received in the way of insurance, and the said Holmes said that we could stipulate to leave the policies with the clerk of the court, or that they may be left with you if you will see that the money is applied; and affiant said all right, and had Conway bring in the policies of insurance, and after compromising deposited the moneys as heretofore stated. That there was nothing in the conversation with the said Holmes about applying said money to any excess judgment in favor of the plaintiff; affiant can't give the date of the conversation, but believes it took place before the property was sold and the money paid afterwards.

The court, after listening to the evidence, the argument of counsel and being fully advised in the premises, overruled and denied said motion. To which said Harder at said time duly excepted.

The court further ordered and directed that the journal
30 entry be filed as of August 30, 1912, and that the said C. F. Harder may if he desires have a right to have said order

reviewed, and may file an application for a re-hearing of such motion as of a date within three days from August 30, 1912.

August 30, 1912, the said C. F. Harder filed in said court his application for rehearing or review, which said motion, caption omitted, is in the words and figures as follows, to wit:

Comes now C. F. Harder, by S. C. Holmes, his attorney, and hereby moves the court to vacate, set aside and hold for naught the findings and judgment heretofore rendered herein and grant a new trial herein for the following reasons, to-wit:

1. Abuse of discretion by the court, misconduct of the defendant, accident and surprise which ordinary prudence could not have guarded against by which the said C. F. Harder was not afforded a reasonable opportunity to present his evidence.

2. Erroneous rulings of the court.

3. The verdict, findings and judgment appear to be given under the influence of prejudice.

4. The verdict, findings and judgment in whole and in part *is* contrary to the evidence.

5. Newly discovered evidence, material to C. F. Harder, which he could not with reasonable diligence have discovered and produced at the trial.

6. The verdict, findings and judgment *is* contrary to the law and the evidence, and *is* against the weight of the evidence, and
31 *is* not supported by sufficient evidence.

S. C. HOLMES,
Att'y for C. F. Harder.

That a hearing was had upon said motion on the 17th day of February, 1913, and upon said hearing the records, files and journal entries were introduced, together with all the affidavits heretofore introduced, and the following affidavits in addition on the part of C. F. Harder.

Affidavit of A. E. Hess, in substance, as follows:

That on the 25th day of February, 1911, I received from S. C. Holmes a check in the sum of $450.00, dated Yates Center, Kansas, drawn on the Yates Center National Bank, payable to the order of A. E. Hess, bearing date February 25, 1911; and that on or about March 31, 1911, I received from the said Holmes check for $550.00, dated March 31, 1911, payable to my order, signed by S. C. Holmes, drawn on the Yates Center National Bank, Yates Center, Kansas. That said checks were cashed by me and I received the money. That said money was the money received from insurance on the hotel in Yates Center, Kansas, which was destroyed by fire, and which said moneys were collected by the said Holmes.

Affidavit of C. G. Ricker, to which are attached copies of the checks referred to in the affidavit of A. E. Hess, and that said checks were paid by the Yates Center National Bank of which he is president.

Certified copy of the draft received from said insurance company, in the sum of $575.00, bearing date March 27, 1911, payable to the

order of E. S. Conway, C. S. Holmes and A. E. Hess, and
32 which is endorsed by said parties; this being the draft delivered to the said S. C. Holmes by the said W. E. Hogueland, and receipted for; copy of the receipt heretofore set out.

Affidavit of S. C. Holmes as to the correctness of said draft so far as the same being a copy, and referring to the receipt given for the same.

Affidavit of Lucy J. Phillips, clerk of said court, in substance as follows:

That on or about the 25th day of February, 1911, in the case of Hess vs. Conway, she paid to Stella M. Holmes $500.00 and received from her receipt heretofore set out, as follows:

"February 25, 1911.

Received of clerk of court $500.00 to apply on said judgment.

S. C. HOLMES,
S."

That on the 15th day of July, 1912, E. S. Conway presented to affiant a receipt of which the following is a true copy:

"Yates Center, Kans., March 31, 1911.

Received of W. E. Hogueland $575.00 in payment of ins. Conway matter apply on judg. Hess vs. Conway.

S. C. HOLMES."

Affidavit of Stella M. Holmes, in substance as follows:

That on the 16th day of January, 1911, in the case of Hess vs. Conway, she delivered to W. E. Hogueland stipulation, copy
33 of which is set out in the affidavit of the said Holmes. That the said Hogueland did not sign it, but said he would talk to Holmes about it.

That on February 25, 1911, she received from the clerk $500.00 and executed the receipt above set out.

Affidavit of S. C. Holmes in substance as follows:

That F. H. Harder was present when the assignment of the certificate of purchase was made in Hess vs. Conway, from A. E. Hess to C. F. Harder. That the said F. H. Harder consulted affiant with reference to insurance and had affiant prepare the motion and affidavit with reference thereto, heretofore set out.

Affiant further avers that the said F. H. Harder consulted affiant and had him prepare the motion filed October 23, 1911. That affiant made the affidavit for the purpose of showing that the insurance money had been advanced by F. H. Harder, and without any particular thought got the impression that F. H. Harder was the owner of the certificate. Had he taken any thought with reference thereto, he would have known that it was owned by C. F. Harder.

The original certificate of purchase, executed by the sheriff to said A. E. Hess, and assigned to the said C. F. Harder, true copy heretofore referred to and filed with the papers in the case.

The original checks, signed by S. C. Holmes and drawn on the Yates Center National Bank, received and cashed by the said A. E.

Hess, referred to in his affidavit and in the affidavit of C. G. Ricker,
one of said checks being in the sum of $450.00, dated Feb-
34 ruary 25, 1911, the other being in the sum of $550.00, dated
March 31, 1911. (Said two checks being the total amount of said insurance money received by the said Holmes less attorney's fees.)

The defendant E. S. Conway offered on said hearing the affidavit of E. A. Hess, which is in substance as follows:

I received from Harder for the sale of the certificate of purchase, in the case of Hess vs. Conway, $1,630.00 (being $1,700.00 less costs). This is not all I have received out of the Conway judgment. The said S. C. Holmes has sent me no money on the E. S. Conway judgment since February 24, 1911. At the time I assigned the sale certificate to C. F. Harder I did not assign all my interest in the judgment against E. S. Conway to the said C. F. Harder or S. C. Holmes.

Upon said hearing, said court made and caused to be entered of record the following order and judgment, which, caption omitted, is in the words and figures as follows, to-wit:

Be it remembered that on the 17th day of February, 1913, being a regular judicial day of the regular November term, 1912, of the above entitled court, this cause coming on to be heard on the motion filed by C. F. Harder for a re-hearing on his motion filed in this cause on the 12th day of August, 1912, and thereupon by consent of the court, this cause was re-argued upon the motion of C. F. Harder filed herein August 12th, 1912, asking an order herein directing the sheriff of Woodson County, Kansas, to execute and
deliver to him, said C. F. Harder, a deed for lands sold herein
35 under order of sale, for the reasons in said motion stated;
C. F. Harder present by S. C. Holmes and Honorable C. W. Shinn, his attorneys; the defendant E. S. Conway present by Lamb & Hogueland, his attorneys; thereupon such motion coming on for hearing and in support thereof, the records, files and journal entries in said cause together with all affidavits introduced upon the hearing heretofore had upon this motion on behalf of said C. F. Harder, as well as the further testimony, to-wit: Affidavit of F. H. Harder filed herein September 5th, 1912; affidavit of S. C. Holmes filed herein September 5th, 1912; affidavit of C. G. Ricker and affidavit of S. C. Holmes filed herein December 23rd, 1912; and affidavits of A. E. Hess, Lucy J. Phillips, Stella M. Holmes, and S. C. Holmes filed herein February 17th, 1913; and likewise, affidavit of C. F. Harder with copy of certificate of purchase and assignment endorsed thereon attached, filed herein February 17th, 1913. The foregoing being the testimony introduced by C. F. Harder in support of his motion; and, in resistance thereof, in addition to the affidavits heretofore filed herein, the following other and further affidavits filed herein were introduced, to-wit: Certificate of Lucy J. Phillips filed herein September 3rd, 1912; two affidavits of W. E. Hogueland; two affidavits of E. S. Conway, defendant; and affidavit of Lucy J. Phillips filed herein September 4th, 1912; also, verified answers and interrogatories of A. E. Hess filed herein November 22nd, 1912; there-

upon such motion was argued, submitted to and taken under advisement by the court.

Be it further remembered that on this 30th day of April, 1913, being a regular judicial day of the regular March term, 1913, of the above entitled court, this cause coming on for decision upon the motion heretofore argued and submitted as above set forth; said C. F. Harder present by S. C. Holmes, his attorney, and the defendant E. S. Conway present by his attorneys, Lamb & Hogueland, and the court having duly considered the records, files, journal
36 entries and affidavits filed herein and introduced upon hearing of such motion and being fully advised in the premises, finds that such motion of said C. F. Harder should be overruled and denied—to which finding he, said C. F. Harder duly excepts.

And further finds that in justice and equity, it should be ordered and directed that within thirty (30) days from this date, to-wit: April 30th, 1913; A. E. Hess, plaintiff in the above entitled action, and S. C. Holmes, his attorney of record, be ordered and directed to return to and deposit in the office of the clerk of this court, the sum of One Thousand and Seventy-five ($1,075.00) Dollars, together with interest upon Five Hundred ($500.00) Dollars thereof at the rate of ten (10 per cent) per cent from February 25th, 1911, to day of payment of same into the office of the clerk of this court; and upon Five Hundred and Seventy-five ($575.00) Dollars thereof, interest at the aforesaid rate, from March 31st, 1911—being the date of payment of same to said S. C. Holmes—to the time such moneys are paid into the office of the clerk of this court pursuant to order herein made, for the use and benefit of the holder of such certificate of purchase, to wit: C. F. Harder; to which finding, A. E. Hess, plaintiff in the above entitled action and S. C. Holmes, his attorney of record, separately, duly except.

It is therefore considered, ordered, adjudged and decreed, that the motion of C. F. Harder for an order upon the sheriff of Woodson County, Kansas, to execute and deliver to him, deed for the lands sold herein be and the same is hereby overruled and denied, to which said C. F. Harder duly excepts.

It is further considered, ordered, adjudged and decreed, that the plaintiff A. E. Hess and S. C. Holmes, his attorney of record,
37 within thirty (30) days from this date, to-wit: (April 30th, 1913), on or before the thirtieth (30th) day of May, 1913, return to and deposit in the office of the clerk of this court, the sum of One Thousand and Seventy-five ($1,075.00) Dollars, together with interest at the rate of ten (10 per cent) per cent per annum upon Five Hundred ($500.00) Dollars thereof, from the 25th day of February, 1911, down to the day upon which they pay the said sum into the office of the clerk of this court; and upon the sum of Five Hundred and seventy-five ($575.00) Dollars thereof, with interest from March 31st, 1911, down to the day such sum is paid into the office of the clerk of this court at the aforesaid rate, such moneys so deposited in connection with the Seven Hundred and Thirty-eight and three one-hundredths ($738.03) Dollars now still on deposit in the office of the clerk of this court aforesaid as redemption money to

be used in the redemption and cancellation of certificate of purchase issued by the sheriff of Woodson County, Kansas, to A. E. Hess, plaintiff herein. To all of which A. E. Hess, plaintiff in the above entitled action, and S. C. Holmes, attorney of record, separately, duly except.

It is further considered, ordered, adjudged and decreed, that C. F. Harder pay costs incurred in this action in the filing of his motion and affidavits herein, taxed at $4.50; and

It is further considered, ordered, adjudged and decreed, that the plaintiff A. E. Hess pay all other costs incurred in and about the filing of affidavits in connection with the motion herein disposed of, taxed at $3.15. To which both parties except so far as is adverse to him.

It is further considered, ordered, adjudged and decreed, that this cause be reserved for such orders and decrees as may be necessary to carry into effect the orders herein made. For all of which judgment is now rendered.

38 The foregoing journal entry was prepared by the court, and the exceptions therein noted were noted by the court upon its own motion in accordance with a rule of practice of this court to note exceptions for the parties to each adverse ruling, order and judgment of the court.

(See memorandum filed herein this day in connection with opinion filed herein August 30th, 1912.)

OSCAR FOUST, *Judge.*

(Filed April 30, 1913.)

May 26, 1913, C. F. Harder gave notice of appeal, to E. S. Conway and S. C. Holmes, in the manner and form provided by law, which was filed in said cause.

May 27, 1913, S. C. Holmes served notice of appeal in the manner and form provided by law, upon E. S. Conway and C. F. Harder, and filed the same in said cause.

The above and foregoing is a true and correct abstract of the pleadings and papers filed in said cause, and the proceedings had and done in said cause, and the evidence offered on the hearing of said cause, and the judgments and orders entered in said cause, and is a true and correct abstract of the record in said cause.

C. W. SHINN,
S. C. HOLMES,
Att'ys for C. F. Harder and S. C. Holmes, Appellants.

39 *Specifications of Error of C. F. Harder, Appellant.*

1. The court erred in overruling by its order of August 30, 1912, appellant's motion for an order on the sheriff of Woodson County, Kansas, for the execution of a deed to appellant C. F. Harder, the owner and holder of the certificate of purchase issued in said action.

2. The court erred in overruling appellant C. F. Harder's motion for a re-hearing of his motion for an order on said sheriff for the execution and delivery of a deed to said appellant.

3. The court erred in finding that the motion of appellant C. F. Harder for an order on the sheriff for the execution of a deed to said appellant should be overruled and denied.

4. The court erred in overruling by its order of April 30, 1913, appellant C. F. Harder's motion for an order on said sheriff of Woodson County, Kansas, for the execution and delivery of a deed to said appellant C. F. Harder, the owner and holder of the certificate of purchase issued in said action.

5. The court erred in finding that A. E. Hess and S. C. Holmes should be ordered and directed to return to, pay in and deposit in the office of the clerk of said court the sum of $1,075.00 and
40 interest for the use and benefit of the holder of said certificate of purchase, C. F. Harder, appellant.

6. The court erred in ordering and adjudging that the moneys ordered to be paid to the clerk of said court by the said A. E. Hess and S. C. Holmes should be used in the cancellation of said certificate of purchase issued in said action by the sheriff of Woodson County, Kansas, owned and held by C. F. Harder, appellant.

7. The court erred in overruling and denying the motion of appellant C. F. Harder, the owner and holder of said certificate of purchase, for an order on the sheriff of Woodson County, Kansas, to execute and deliver to the said C. F. Harder, appellant, a deed for the lands sold in said action.

8. The court erred in rendering judgment for costs against the appellant, C. F. Harder.

C. W. SHINN,
S. C. HOLMES,
Att'ys for C. F. Harder, Appellant.

41 *Specifications of Error of S. C. Holmes, Appellant.*

1. The court erred in finding that S. C. Holmes, appellant, should be ordered and directed to return to or pay in and deposit in the office of the clerk of said court the sum of $1,075.00, together with interest thereon at the rate of ten per cent per annum.

2. The court erred in ordering, adjudging and decreeing that said appellant S. C. Holmes return to or pay in and deposit in the office of the clerk of the District Court in and for Woodson County, Kansas, the sum of $1,075.00, together with interest thereon at the rate of ten per cent per annum.

C. W. SHINN,
S. C. HOLMES,
Att'ys for S. C. Holmes, Appellant.

42 Be it remembered, that on February 14th 1914, there was filed in the office of the clerk of the supreme court of the state of Kansas the counter abstract of the appellee, which counter abstract is in the words and figures as follows, to-wit:

43 Filed Feb. 17 1914. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of Kansas.

18792.

A. E. Hess (C. F. Harder and S. C. Holmes, Appellants)
vs.
E. S. Conway et al., Appellees.

Abstract of Appellees.

G. H. Lamb, W. E. Hogueland, Attorneys for Appellees.

44 In the Supreme Court of Kansas.

A. E. Hess (C. F. Harder and S. C. Holmes, Appellants)
vs.
E. S. Conway et al., Appellees.

Abstract of Appellees.

We are not satisfied with the appellants' abstract of the testimony offered by the appellee- on the hearing of this case, hence we submit a counter abstract of the same. We also submit a counter abstract of the affidavit of S. C. Holmes, used on the hearing by appellants of said case the same being dated February 11, 1913.

The basis of the contention in this matter is a motion filed by appellant to compel the sheriff to execute and deliver a sheriff's deed to the appellant, C. F. Harder, after E. S. Conway the owner of the mortgaged property had paid the full purchase price with interest to redeem his property.

45 Said motion being as follows:

Comes now C. F. Harder, by S. C. Holmes, his attorney, and moves the court for an order requiring said sheriff to execute deed herein and for writ of assistance and an order requiring said sheriff to put the said C. F. Harder in possession of the real estate heretofore sold herein by said sheriff, for the following reasons, to-wit:

1. Said C. F. Harder is the owner and holder of the certificate of purchase heretofore issued herein by said sheriff upon the sale of said real estate.

2. No redemption has been had, as provided by law, no moneys paid to said purchaser, nor has the sum provided by law for redemption been paid into court for the holder of said certificate.

3. Said sheriff without authority of law has refused and still refuses to execute a sheriff's deed to said purchaser, as provided by law, and to put said purchaser in possession, although demanded so to do.

S. C. HOLMES,
Att'y for C. F. Harder.

In support of said motion appellant offered in evidence the "files and record in said case," and certain affidavits set out on pages 8-9-10-11-12-13 of appellants' abstract and appellee- offered certain evidence in the form of affidavits and the court records in said case, which are as follows:

Affidavits on Behalf of Appellees.

(Caption Omitted.)

Lucy J. Phillips, being first duly sworn, deposes and says:
46 That she is the Clerk of the District Court of Woodson County, Kansas. That she has examined the files and records in said above case and finds therefrom:

That on the 16th day of November, 1910, plaintiff recovered a judgment against E. S. Conway for $2,612.00 with 10 per cent interest and obtained foreclosure upon the land described in plaintiffs' petition.

That on the 14th day of December, 1910, an order of sale was issued for said property.

That on the 19th day of January, 1911, said property was sold to A. E. Hess, the plaintiff, for the sum of $1,700.

That on the 24th day of February, 1911, E. S. Conway paid to me as such clerk the sum of $500 to apply on redemption of said *said* premises.

That on the 15th day of July, 1912, E. S. Conway presented to me a receipt for $575 signed by S. C. Holmes and stating it was in payment of insurance in Conway matters, dated March 31, 1911, and which said Conway informed me was paid on redemption of said property.

That on July 15th, 1912, said E. S. Conway paid me $738.03 to redeem said property, and said sums being the full amount with interest necessary to redeem said property, I issued to said E. S. Conway a receipt showing that said property had been redeemed.

LUCY J. PHILLIPS.

E. S. Conway, being first duly sworn, says:

That he is one of the defendants above named. That on the 16th day of November, 1910, the plaintiff obtained a judgment against him for the sum of $2,620.00 and had a certain deed declared
47 a mortgage and foreclosed the same upon the following property, to-wit:

All that certain piece, tract of parcel or tract of land situated and being in the northeast quarter (N. E. ¼) of the northwest quarter (N. W. ¼) of Section seven (7), in Township twenty-five (25), Range sixteen (16), Woodson County, Kansas, and described as follows, to-wit:

Beginning at a point marked by a sandstone corner-stone with a cross mark in the top of said stone, which said corner-stone is fifty (50) feet south of the center of the main track of the Missouri

Pacific Railroad, Wichita Division, commonly known as the St. Louis, Ft. Scott & Wichita Railroad, and one hundred (100) feet west of the center of the main track of the Kansas, Colorado & Pacific Railway Company, thence almost due south along said right of way to said Kansas, Colorado & Pacific Railway Company one hundred and ten (110) feet to a sandstone corner-stone described and marked by a cross in the top, thence west about sixteen (16) rods to the right of way of said Ft. Scott & Wichita Railroad, thence northeast along the right of way to said Ft. Scott & Wichita division of the Missouri Pacific Railway to the place of beginning.

All that tract of land lying in the Sixth Addition to Yates Center, Kansas, lying west of a tract deeded to W. A. Taylor and T. T. Davis, by Abner Yates and wife and between the right of way of St. L. Ft. Scott & Western Railroad and Rutledge Street in said Sixth Addition to Yates Center, Kansas.

48 That an order of sale was issued on the 14th day of December, 1910, and said property was sold to said plaintiff for the sum of $1,700.00.

That there *was* certain buildings upon the following part of said property, to-wit:

All that tract of land lying in the Sixth Addition to Yates Center, Kansas, lying west of a tract deeded to W. A. Taylor and T. T. Davis by Abner Yates and wife and between the right of way of St. L. Ft. Scott & Western Railroad and Rutledge Street in said Sixth Addition to Yates Center, Kansas.

That the same were destroyed by fire and this defendant had insurance on same and collected about the sum of $1,075.00 therefor and applied the same toward the redemption of all the property so sold to plaintiff, and afterwards he paid the balance necessary to redeem said property with interest, costs, taxes and insurance. That said $1,075.00 was paid by affiant's attorneys, Lamb & Hogueland, duly authorized and instructed to apply the same to the redemption of said property so sold. That $500 of the said sum was paid to the clerk of the District Court and the following receipt taken, to-wit:

"No. 3413.

Office of Clerk of District Court, Woodson County, Kansas.

A. E. Hess, Plaintiff,
vs.
E. S. Conway et al., Defendants.

Yates Center, Feby. 24, 1911.

Received of Lamb & Hogueland the sum of five hundred and no-100 dollars, the same being in part payment of the redemption in the above entitled cause.

$500.00-100.

LUCY J. PHILLIPS."

That the sum of $575.00 was sent to S. C. Holmes, the duly authorized and action attorney for both the plaintiff and C. F. Harder, by Lamb & Hogueland. That afterwards he caused the balance of said redemption money, interest, taxes and costs to be paid to the clerk of the District Court of Woodson County, amounting to $738.03 and received a receipt for same as follows, to-wit:

"No. —.

Clerk of District Court, Woodson County, Kansas.

A. E. HESS, Plaintiff,
vs.
E. S. CONWAY, Defendant.

YATES CENTER, July 15th, 1912.

Received of E. S. Conway, the sum of Seven Hundred Thirty-eight & 03/100 dollars, the same being in full of the balance of redemption of lands in the above entitled cause.
$738.03/100.

LUCY J. PHILLIPS,
Clerk Dist. Court."

That after the redemption of the same, the said S. C. Holmes, attorney for C. F. Harder, turned over the insurance policy that he had procured on the Durand property, to this affiant with the full knowledge that this affiant had redeemed the said propety, and made no objection whatever.

That shortly after paying the said first two payments, he (Conway) had a talk with F. H. Harder, a son of C. F. Harder, who was representing his father and acting for him, in which affiant informed him that he had paid the said $1,075 to Holmes,
50 his father's attorney, for the purpose of redeeming said property and he made no objection thereto. And affiant informed him that Hess was indebted to this defendant and he wished to collect it if he could. Said F. H. Harder stated to this defendant that Hess had nothing to do with the judgment in this case, that Hess had received all his money.

That affiant shortly before paying the balance of said redemption money had a talk with S. C. Holmes, attorney for C. F. Harder, and asked him what amount was necessary to redeem said property after deducting the sums already paid, and said Holmes informed said affiant that he did not have all the dates of payment, but that the clerk of the court had them and for this affiant to go over and have the clerk figure it, and affiant did so, and paid the amount she figured was necessary.

That said C. F. Harder, S. C. Holmes, his attorney, and F. H. Harder after obtaining an assignment of said certificate of purchase, concealed the instrument and kept it from record and falsely stated that F. H. Harder was the owner of said certificate, and said

C. F. Harder never disclosed that he was the owner of said certificate until long after this affiant had redeemed the said property, when he placed an assignment of the same upon the records in the office of the Register of Deeds in Woodson County, Kansas, on the 24th day of August, 1912.

Affiant further says that he has been unable to locate the whereabouts of said plaintiff and unable to procure his testimony herein.

That the said A. E. Hess had no claim upon the insurance money of $1,075.00 as the same was received, and said in-
51 surance paid for in the name of E. S. Conway, and was received as a compromise settlement with the insurance company. This affiant says, however, that he agreed that said sum of $1,075 should be applied to the redemption of said property and that he authorized his attorneys, Lamb & Hogueland, to make such agreement with S. C. Holmes, attorney for plaintiff, C. F. Harder and F. H. Harder.

E. S. CONWAY.

(Caption omitted.)

W. E. Hogueland, being first duly sworn, says that he is a member of the law firm of Lamb & Hogueland. That they were attorneys for the defendant, E. S. Conway, in the above case. That some time after judgment was obtained and after the property was sold in the above case, this affiant was informed that said S. C. Holmes was about to commence some additional proceedings against said E. S. Conway and the insurance company. That at that time said E. S. Conway was endeavoring to effect a settlement and compromise with the insurance companies for his loss, and affiant informed said E. S. Conway that said Holmes was about to make him further trouble and said Conway informed this affiant that Holmes need not go to any trouble, that he intended to apply any money he might receive from the insurance company toward redeeming his property.

That affiant called S. C. Holmes up over the phone and said to him in substance what Mr. Conway said, and Holmes replied,
52 that if affiant would personally see that said money was turned over the matter would be satisfactory, and affiant agreed to do so.

That when the first $500 was received, which was about Feb. 24, 1911, affiant caused the same to be paid to the clerk of the District Court, and she issued the following receipt, to-wit:

"No. 3413.

Office of Clerk District Court, Woodson County, Ks.

YATES CENTER, Feb'y 24, 1911.

A. E. HESS, Plaintiff,
vs.
E. S. CONWAY et al., Defendants.

Received of Lamb & Hogueland the sum of Five Hundred & no/100 dollars, the same being in part payment of the redemption in the above entitled cause.

$500.00/00 LUCY J. PHILLIPS."

That the additional payment of $575 was delayed for some time and said S. C. Holmes during said delay frequently called up over the phone and asked affiant "What about the Conway insurance?" When the same was received, which was about March 31st, 1911, this affiant sent the draft over to Mr. Holmes' office by messenger, and he received and receipted for same.

That affiant had no interest in the matter except to follow out the instructions of E. S. Conway, his client, and to keep his agreement with said S. C. Holmes, that said money should be paid.

That this affiant had no knowledge that said S. C. Holmes ever denied or claimed that said money was paid other than to the
53 redemption of said property until two or three days after the last redemption money had been paid. That then affiant heard it from outside rumor and said S. C. Holmes had never claimed to this affiant personally any different arrangement.

W. E. HOGUELAND.

Here appellee introduced, without objection, the records and trial and appearance dockets in this court during the 10 years past to show that said C. F. Harder has been a continuous litigant in this court and that S. C. Holmes has always appeared as his attorney in said litigation, and that the records show that the surplus judgment against Conway in this case has never been released.

Such record as abstracted shows that from Nov. 1902, down to August, 1912, C. F. Harder's name appears as a litigant on the records of said court 42 times, and at each of said times S. C. Holmes appears as his attorney, and that during said 10 years, the name of said C. F. Harder has appeared as a litigant at every term of said court except Nov. 1910, March, June and Nov. 1911, and March, 1912, and in all of said cases S. C. Holmes appears as his attorney.

See copies Clerk's Certificates following:

I, Lucy J. Phillips, clerk of the District Court in and for the County of Woodson, State of Kansas, do hereby certify that the judgment in the case of Hess v. Conway was not released
54 of record on August 30th, 1912, and has not since been released of record. Further certify that no one has offered to

release same, and that said judgment still stands of record and in full force and effect.

Witness my hand and the seal of said court, affixed at my office, this 13th day of February, A. D. 1914.

[SEAL.] LUCY J. PHILLIPS,
Clerk of District Court.

I hereby certify that beginning with the November term, 1902, of this court the name of C. F. Harder appears on the trial dockets of this court as a litigant forty-two (42) times, and at each of said times S. C. Holmes has appeared as his attorney. I also certify that at each of said terms of court during the 10 years, from November, 1902, to and including November, 1912, except November, 1910, March, June and November, 1911, and March, 1912, the name of C. F. Harder appears as litigant on the docket of this court and S. C. Holmes appears as his attorney.

Witness my hand and seal of this court affixed at my office this 12th day of February, A. D. 1914.

[SEAL.] LUCY J. PHILLIPS,
Clerk of District Court.

F. H. Harder filed a motion in this cause on June 1, 1911, claiming to own said certificate of purchase and asked for a receiver as follows, to-wit (Caption omitted):

Comes now F. H. Harder, the holder of the sheriff's sale certificate, by S. C. Holmes, his attorney, and hereby moves the
55 court to appoint a receiver herein with power to write insurance on the hotel at Durand, Kansas, upon which mortgage was foreclosed herein and sale had and included in said certificate of purchase for the reason that no insurance can be written covering said property without the appointment of a receiver, and for the further reason, that a large portion of the value of said property consists of said hotel building.

S. C. HOLMES,
Att'y for F. H. Harder.

Said motion was supported by the affidavit of F. H. Harder as follows, to-wit:

F. H. Harder being duly sworn, on his oath says: that he is the owner of the sheriff's sale certificate in the case of A. E. Hess v. E. S. Conway et al., the same having been assigned to affiant by A. E. Hess, plaintiff, who purchased said property at the sheriff's sale.

Affiant further avers that said mortgage did include hotel at Durand and a hotel at Yates Center, but the Yates Center hotel burned some time prior to said sale.

Affiant further avers that he has endeavored to get the hotel at Durand insured but is unable to do so. That he has made inquiry and investigations and from the best information he can obtain, there is no insurance upon the same.

Affiant further avers that he desires a receiver appointed with power to write said insurance.

Further affiant saith not.

F. H. HARDER.

56 On Oct. 23, 1911, said F. H. Harder again filed a motion in said cause for the appointment of a receiver as follows (Caption omitted):

Comes now F. H. Harder, by S. C. Holmes, his attorney, and moves the court for an order permitting the receiver heretofore appointed herein, to collect a sufficient sum from the rents of said premises to pay the insurance on said premises and to make needed and necessary repairs for the reasons stated and contained in the affidavit hereto attached.

S. C. HOLMES,
Att'y for F. H. Harder.

Said motion was supported by the affidavit of S. C. Holmes as follows, to-wit:

STATE OF KANSAS,
Woodson County, ss:

S. C. Holmes, being duly sworn, on his oath says: That he is the attorney for the plaintiff and F. H. Harder herein, and that the said F. H. Harder is the owner of the certificate of purchase herein. That the said F. H. Harder advanced for the insurance on said premises to said receiver the sum of $25.80.

Further affiant saith not.

S. C. HOLMES.

Both the foregoing motions and affidavits were introduced by appellees on hearing of this matter.

The original certificate of purchase was placed on the records in the register of deeds office on Aug. 24, 1912, after the redemp-
57 tion period had expired, and showed that Hess had assigned it to C. L. Harder and that F. H. Harder never had been the owner thereof.

The following affidavits were introduced in rebuttal on the hearing of appellant's motion.

(Caption omitted.)

E. S. Conway says that he made an affidavit in the above case. That he has read the affidavit of S. C. Holmes and C. F. Harder filed since he made his affidavit.

That he never heard of the stipulation mentioned therein. That he never consented to any such stipulation or authorized W. E. Hogueland or anyone for him to execute the same, and the same was never executed to his knowledge.

That affiant had no knowledge whatever that anyone except plaintiff claimed to be the owner of said sale certificate until one F. H. Harder applied for a receiver to take charge of said property, and he

and S. C. Holmes filed affidavits that one F. H. Harder was the owner of said sale certificate, which affidavits are hereby referred to and bear date of May 29th, 1911, and October 20th, 1911, which was long after the payment of said insurance money.

That when affiant authorized said W. E. Hogueland to apply the proceeds of said insurance, he expected the same to — applied in such a way as to save his property. That the property purchased by the plaintiff for $1,700 was and is reasonably worth $3,500.

E. S. CONWAY.

58 (Caption omitted.)

W. E. Hogueland, being first duly sworn, says that he has heretofore made an affidavit in the above case. That since making the same he has read the affidavit filed herein by S. C. Holmes.

That affiant has no recollection whatever of the said Holmes ever presenting the stipulation set out in the affidavit of said S. C. Holmes or of ever seeing the same, until he read said affidavit.

That affiant had no authority in the matter except such as he received from his client, E. S. Conway, and he never had any authority to apply said insurance money to the payment of any excess judgment the plaintiff might have in the above case.

Affiant says that after the fire in which certain buildings belonging to E. S. Conway were burned, the insurance adjusters came to affiant's office and went over the loss, and informed affiant that they had been to the court house and investigated the record and that the insurance was void, and left town without making any adjustment of said loss. That affiant was informed that prior to the coming of said adjusters, they have been informed that Mr. Holmes was making some claim to said insurance.

That after said adjusters had refused to settle said insurance, affiant commenced some negotiations to compromise with the insurance companies. That about this time affiant was informed that Holmes was about to commence some kind of a proceeding
59 against the insurance company and realizing that if the matter got into court no one would recover, as by the terms of the policies they were void, and affiant, after talking with Conway, called *by* said S. C. Holmes over the telephone and said to him in substance that it was not necessary to commence any legal proceeding; that Conway intended to apply everything he received from said insurance companies; that said Holmes said, in substance, that he could stipulate that the policies could be left with the clerk of the District Court if he said "They may be left with you, if you will see that the money is applied and affiant said "all right" and had Conway bring the policies in, and after they were compromised, affiant disposed of the money as stated in his former affidavit. That there was nothing said in any of the conversations between said Holmes and affiant about applying said money to any excess judgment that the plaintiff might have. That affiant cannot give the exact date of said conversation, but believes said conversation took place before said property was sold, and the money paid afterwards.

W. E. HOGUELAND.

Upon this hearing the court denied the appellants' motion later and on February 17th, 1913, a rehearing was had on the application of the appellant, and he offered additional affidavits of E. A. Hess, S. C. Holmes, Lucy J. Phillips and Stella M. Holmes found on pages 20 and 21 of appellants' abstract, and another affidavit of S. C. Holmes, a part of which is found on page 22 of appellants'
60 abstract. We here insert said affidavit in full, as follows:

STATE OF KANSAS,
County of Woodson, ss:

S. C. Holmes being duly sworn, on his oath says: That F. H. Harder was present when the assignment of certificate of purchase was made in the case of Hess vs. Conway, from A. E. Hess to C. F. Harder. That the said F. H. Harder consulted affiant with reference to paying insurance and had affiant prepare motion and affidavit of F. H. Harder, filed herein June 1, 1911, in which the said F. H. Harder swears he is the owner of said certificate.

Affiant further avers that the said F. H. Harder consulted affiant and had him prepare motion herein October 23, 1911; that affiant made the affidavit attached thereto for the purpose of showing that said insurance money had been advanced by F. H. Harder, and without any particular thought in the matter got the impression from the above papers and his conversation with the said F. H. Harder that he was the owner. Had affiant called the matter to mind, of course, he knew the certificate was assigned to C. F. Harder, having prepared the assignment himself.

S. C. HOLMES.

Subscribed in my presence and sworn to before me this 11th day of February, 1913.

[SEAL.] STELLA M. HOLMES,
Notary Public.

Commission expires Feb. 10, 1915.
Filed Feby. 17, 1913, Lucy J. Phillips, Clerk Dist. Court.

61 On rehearing appellee offered the affidavit of A. E. Hess, as follows:

A. E. Hess, being first duly sworn, answers the following interrogatories:

1. When you sold the sale certificate of the Durand Hotel in Woodson County, Kansas, to Harder how much did he pay you?

A. $1,630.

2. Was that sum all you were to receive out of the E. S. Conway judgment?

A. No.

3. Has S. C. Holmes sent you any money on the E. S. Conway judgment since the 24th day of February, 1911?

A. No.

4. If you answer that he has, please state how much and when.

A. ——.

A. At the time you assigned the sale certificate to C. F. Harder did you assign all your interest in the E. S. Conway judgment to him or S. C. Holmes?

A. No.

A. E. HESS.

This affidavit was sworn to before O. S. Fulton, a Notary Public of the State of Oregon, on Nov. 14, 1912, and was filed for record Nov. 22, 1912.

62 In this rehearing the court considered all the evidence offered on the former hearing as well as the additional evidence and overruled and denied appellants' motion and made findings, conclusions and judgment as set out in abstract at pages 23 to 27 thereof.

No transcript or record of the proceedings had in this case been filed by appellants in the District Court, hence we cannot refer to pages of any record, but we certify that the matters and things herein set out, in this abstract are true and correct, but we specifically deny that the matters and things set out in appellants' abstract of the proceedings on behalf of appellee are correct or that they were taken from any transcript or record in said case.

G. B. LAMB,
W. E. HOGUELAND,
Attorneys for Appellees.

63 Be it further remembered, that afterward, on Tuesday the 2nd day of June 1914, the same being one of the regular judicial days of the January term, 1914, of the supreme court of the state of Kansas, before the said court in session at the supreme court room in the city of Topeka, the following proceeding, among others, was had, and entered of record in words and figures as follows, to-wit;

64 In the Supreme Court of the State of Kansas, Tuesday, June 2, 1914.

No. 18792.

A. E. HESS, Appellee,
vs.
E. S. CONWAY et al., Appellants.

Journal Entry of Submission.

This cause comes on to be heard on the notices of appeal, transcript of the judgment and abstract of the record of the district court of Woodson county; thereupon after oral argument by G. H. Lamb for the appellee, said cause is submitted on brief of counsel for both parties and taken under advisement by the court.

65 Be it further remembered, that afterward, on Tuesday the 7th day of July 1914, the same being one of the regular judicial days of the July term, 1914, of the supreme court of the state of Kansas, before the said court in session at the supreme court room in the city of Topeka, the following proceeding, among others, was had, and entered of record in words and figures as follows, to-wit:

66 In the Supreme Court of the State of Kansas, Tuesday, July 7, 1914.

No. 18792.

A. E. HESS (C. F. HARDER and S. C. HOLMES, Appellants,)
vs.
E. S. CONWAY et al., Appellees.

Journal Entry of Judgment.

This cause comes on for decision; and thereupon it is ordered and adjudged that the judgment of the court below be affirmed. It is further ordered that the appellants pay the costs of this case in this court taxed at $—, and hereof let execution issue.

67 Be it remembered, that on July 7th, 1914, there was filed in the office of the clerk of the supreme court of the state of Kansas, the court's syllabus and opinion, which syllabus and opinion is in the words and figures as follows, to-wit:

68 No. 18792.

A. E. HESS (C. F. HARDER and S. C. HOLMES, Appellants,)
v.
E. S. CONWAY et al., Appellees.

Appeal from Woodson County.

Affirmed.

Syllabus by the Court.

BURCH, *J.:*

1. Knowledge by an attorney for the holder of a certificate of purchase of land sold at a judicial sale of a contract which he had negotiated between the purchaser and the landowner relating to redemption, and of the payment of money, which came into his hands, by way of redemption according to the contract, will be imputed to an assignee of the certificate who soon afterwards employed the same attorney to represent his interests, when the knowledge was present in the mind of the attorney throughout his second employment.

2. Knowledge that the attorney had obtained possession of the redemption money paid under the contract, imparted to an agent of the assignee who had active charge of his principal's interests as a holder of the certificate, will be imputed to the principal.

3. With knowledge of the contract and of the possession by his attorney of the money paid for redemption, the assignee of the certificate acquiesced and permitted the landowner to complete redemption by paying to the clerk of the district court the remainder of the sum necessary for that purpose. Held, after the period of redemption expired the holder of the certificate was estopped to deny that redemption
69 had been affected.

4. The portion of the redemption obtained by the attorney not having been paid to the holder of the certificate, it belonged in the custody of the clerk of the district court and the court had summary jurisdiction to compel the attorney to restore to the treasury of the court the money which he had diverted.

5. The facts were developed on the hearing of a motion filed by the attorney on behalf of the certificate holder to require the sheriff to execute a deed. The only substantial issues were those involving the professional conduct of the attorney, who was a witness and who conducted the proceedings as an attorney. Held, the court was authorized to exercise its disciplinary power over the attorney as one of the results of the investigation.

All the justices concurring.

A true copy. Attest:

Clerk Supreme Court.

70 No. 18792.

The opinion of the court was delivered by

BURCH, *J.:*

The action was commenced originally by Hess to foreclose a real estate mortgage given by Conway. Judgment was rendered for the plaintiff and the property was sold. After the period of redemption expired Harder, as the holder of the certificate of purchase, presented it to the sheriff and demanded a deed. On the refusal of the sheriff to comply with the demand Harder filed a motion to require him to do so. The motion was resisted by Conway who claimed that he had redeemed. Judgment was rendered in his favor and Harder appeals.

There are some serious disputes in the briefs concerning the true facts of the case. It would serve no beneficial purpose to print the evidence and to discuss it at length, as would be necessary if it were discussed at all. There are some unfortunate conflicts of testimony

to be resolved, and some inferences are to be derived from pregnant facts and circumstances, and from failure to frankly clear up some matters left in doubt. Consequently the facts upon which the questions of law arise will be stated as the court evidently found them to be by its general finding in favor of Conway, in which finding this court is constrained to concur.

The judgment of foreclosure was rendered on November 16, 1910, and included a personal judgment against Conway for $2612. On December 14, 1910, an order for the sale of the property was issued. On December 30, 1910, a building forming a part of the mortgaged premises was destroyed by fire. On January 19, 1911, the sheriff's sale occurred, which was confirmed on February 6, 1911. The sale was made to the plaintiff, Hess, and the certificate of purchase was issued to him, but it was immediately assigned to Harder in consideration of the payment of the sale price, from which the costs were deducted. The assignment of the certificate to Harder was prepared by S. C. Holmes, the attorney for the plaintiff, who thereafter had professional charge of Harder's interests as occasion required. Harder's son, F. H. Harder, was present when the certificate of sale was assigned.

71 The building which burned was insured and on January 9, 1911, Hess filed a motion asking that Conway be required to bring into court the policies of insurance and any moneys received thereon. It was doubtful whether or not the insurance was legally collectible and W. E. Hogueland, attorney for Conway, agreed with Holmes, as attorney for Hess, to effect a settlement with the insurance company and to apply the proceeds to the redemption of the property. Thereupon the motion which had been filed was abandoned. This arrangement was made three days before the sale was to take place. On February 24, 1911, Hogueland paid to the clerk of the district court insurance money which he had collected in the sum of $500 and applied it to the redemption of the property, taking the clerk's receipt accordingly. On the next day Holmes drew this money from the clerk. On March 31, 1911, Hogueland received a draft for insurance money payable to the order of Conway, Hess, and Holmes. After Conway had indorsed the draft Hogueland turned it over to Holmes who received the money upon it. On July 15, 1912, Conway paid to the clerk of the district court the remainder of the sum necessary to effect redemption.

The testimony of Hess was taken by interrogations and propounded to him and answered under oath on November 22, 1912. In answer to one of the questions Hess stated that since February 24, 1911, Holmes had not sent him any money on the Conway judgment. Following this interrogotary was another asking him to state when and how much money he had received from Holmes on the Conway judgment, if any had been received, but the second interrogatory was unanswered. Some months later Hess made an affidavit that he received from Holmes personal checks for the proceeds of the insurance money, which he cashed, but he did not modify his earlier testimony. The insurance money was more than sufficient to satisfy

the excess judgment against Conway, if so applied, but the judgment has never been released.

The certificate of purchase included a hotel building at Durand which needed insurance and on June 1, 1911, Holmes presented to the court an application for the appointment of a receiver in order that insurance might be effected. The application was made in the name of C. F. Harder's son, F. H. Harder, and was supported by an affidavit of F. H. Harder that he owned the certificate of purchase. On October 23, 1911, Holmes again presented a mo-
72 tion in the case supported by his own affidavit that F. H. Harder was the owner of the certificate of purchase. This affidavit stated that F. H. Harder had advanced the sum of $25.80 to insure the property and the purpose of the motion was to secure the appointment of a receiver to collect rents to pay this sum and to make some repairs. C. F. Harder was in fact the owner of the certificate of purchase at all times subsequent to its assignment to him and F. H. Harder and Holmes were acting for him in the various matters referred to.

While F. H. Harder was acting for his father Conway had a conversation with him in which he was told that Conway had paid $1075 to his father's attorney, Holmes, for the purpose of redeeming the property. Before the final payment by way of redemption was made Conway had a conversation with Holmes in which Conway inquired the amount necessary to redeem after deducting the sums already paid. Holmes replied that he did not have all the dates of payment but that the clerk of the court had them and that the clerk would furnish the figures. Holmes had possession of the insurance policy which had been procured on the Durand hotel. After the last payment by way of redemption had been made Holmes, without objection, delivered the policy to Conway upon Conway's paying for it. The period of redemption expired on July 19, 1912. On August 12, Holmes as Harder's attorney filed the motion which is the basis of the present controversy.

There were two full hearings on the motion to require the sheriff to make a deed, one in August, 1912, and the other in February, 1913. C. F. Harder filed an affidavit in the cause but he gave no testimony in denial of Conway's contention that Holmes had been his attorney from the inception of his interest, or that he was ignorant of the payment of the insurance money to Holmes under the agreement that it would be applied to the redemption of the property. The clerk of the court made the following certificate, which was read in evidence:

"I hereby certify that beginning with the November term, 1902, of this court the name of C. F. Harder appears on the trial dockets of this court as a litigant forty-two (42) times, and at each of said times S. C. Holmes has appeared as his attorney. I also certify that at each of said terms of court during the 10 years from No-
73 vember, 1902, to and including November, 1912, except November, 1910, March, June and November, 1911 and March, 1912, the name of C. F. Harder appears as litigant on the docket of this court and S. C. Holmes appears as his attorney."

The property involved is estimated to be worth $3500. If redemption did not occur Harder would be the beneficiary of a good bargain and the excess judgment in favor of Hess above the sale price would be satisfied.

Section 448 of the civil code reads as follows:

"The mode of redemption as herein provided is by paying the money into the office of the clerk of the district court for the use of the persons thereunto entitled. The person so redeeming, if not the defendant owner in execution or order of sale, must also file his affidavit or that of his agent or attorney, stating as nearly as practicable the amount still unpaid due on his claim. The clerk shall give him a receipt for the money, stating the purpose for which it is paid. He must also enter the same upon a book kept for that purpose, with a minute of such redemption, the amount paid, and the amount of the lien of the last redemption or as sworn to by him." (Gen. Stat. 1909, sec. 6083.)

Harder argues that nothing less than actual payment to the clerk of the district court will effect redemption and cities the case of Stewart v. Park College, 68 Kan. 465, 75 Pac. 491, in which it was said:

"The right to redeem and the mode of redemption of real estate, after sale by the sheriff upon execution, special or general, or order of sale, are fixed by statute." (P. 467.)

The judgment in the case cited was entered in Wyandotte county. The facts upon which equitable redemption was claimed were the following:

"In his petition plaintiff further averred that frequently before the expiration of the eighteen months from the date of sale he went to the place of business of the board of trustees, in Missouri, with a certified check for the full amount of the judgment and interest thereon, with a view and for the purpose of redeeming the premises from the foreclosure sale; that before each effort made by him to redeem he notified the board of trustees of the fact that he would call and make such redemption, and that upon each occasion they failed to be present." (p. 466.)

74

The court said that Stewart not only did not comply with the statute but made no effort to do so.

The statute very properly provides for redemption by payment to the clerk of the court, who acts as an officer of the law and not as the agent of any party in interest. But interested parties may bind themselves by contracts departing from the statute as to time, terms, and mode of redemption, and they may otherwise place themselves in such situations that a strict application of the letter of the statute would accomplish a fraud in favor of the person demanding it. If in the case of Stewart v. Park College, Stewart had found the members of the board of trustees at their office and they had accepted his certified check for the full amount of the judgment and interest, they would have been estopped to dispute the fact that redemption had been made. In all cases of the character indicated the court will deal with the question of redemption as the law and as equity and good conscience may require.

On the eve of the sheriff's sale Holmes and Hogueland, as at-

torneys for their respective clients, agreed that the insurance money should be applied to the redemption of the land. Hess purchased at the sheriff's sale subject to this condition, and when he assigned the certificate of purchase he and Holmes knew that the insurance money would go to redeem the land and not to satisfy the excess judgment. This is the turning point in the case. Mr. Holmes claims he understood the agreement with Mr. Hogueland differently. After carefully considering all the strong arguments for his view this court, as already stated, feels that the trial court was best able to determine the matter. The result is that Holmes could draw the first payment of insurance money from the clerk of the court, who had received and receipted for it for redemption purposes, for the benefit of no one but the holder of the certificate of purchase, who at that time was Harder; and Holmes received the proceeds of the draft for the second installment of insurance money for the benefit of Harder. Soon afterwards, Holmes is found in
75 court engaged in the protection of Harder's interests as a holder of the certificate of purchase. Holmes had complete knowledge of all the facts relating to the insurance money. Harder's son and agent, F. H. Harder, was informed that Holmes had received $1075 to apply in redemption of the premises, and Harder himself is non-committal on the subject of his knowledge.

The general finding doubtless includes a finding that Harder himself had knowledge of the facts relating to the insurance money. If not, the actual knowledge of *of* his attorney will be imputed to him. It was the duty of the attorney to communicate his knowledge to his principal, the presumption is that he did so, and the principal is not allowed to dispute the presumption. (2 R. C. L. 962.)

Let it be conceded that in making the transfer of the certificate from Hess to Harder, Holmes acted as attorney for Hess. When he was employed by Harder to protect Harder's interest in the land as a holder of the certificate of purchase, in the very matter of insurance, it could not have escaped his memory that he had received $1075 of insurance money to apply on the redemption of that certificate.

"Notice to an agent or attorney is notice to his principal or client in regard to the matter in which he is engaged; and where a purchaser employs the same attorney as the vender, he will be affected with notice of whatever such attorney acquired notice of, in his capacity of attorney for either vender or purchaser, in the transaction in which he was employed. Notice to the attorney which will bind client must be notice in the particular transaction in which the client has employed him. So, where one of two matters transacted by the same attorney, though the former was for another client, follows so soon after the other that it clearly appears that the earlier transaction cannot have been out of the mind of the attorney when engaged in the latter, there is no ground for restricting the notice to the client to the second transaction, but he will be affected with notice of both." (Nelms and others vs. Pabst Brewing Co. and others, 93 Wis. 153, 166, 66 N. W. 518.)

76 If Harder himself did not know the facts relating to the insurance money, the actual knowledge of his son, F. H.

Harder, acquired while in active charge of his interest in the land as a holder of the certificate of purchase, will be imputed to him under well settled principles of law.

With knowledge of the facts Harder acquiesced in the application which had been made of the insurance money and suffered Conway to redeem on that basis. If Harder desired to repudiate the application of the insurance money which had been agreed on, and which Conway understood had been made, he should have done so when reminded that his attorney held for him $1075 which Conway had paid by way of redemption. After that he could not remain silent and thereby unduce Conway to complete redemption by paying only the balance above the insurance money, and then after the period for redemption had expired deny that redemption had been accomplished.

The court of its own motion ordered Holmes to deposit in the office of the clerk of the district court within thirty days the sum of $1075, with interest on $500 from February 25, 1911, and interest on $575 from March 31, 1911, at ten per cent per annum. The sum so ordered to be deposited, together with the sum of $783.03 already on deposit as redemption money, was directed to be used in the redemption and cancellation of the certificate of purchase. The cause was reserved for such orders and decrees as may be necessary to carry into effect the other orders made. Holmes appeals.

Holmes insists that he was not a party to the action, that he had not been served with process, that no pleadings were on file charging him with liability which he could answer, and that the evidence was insufficient to sustain the order.

The question as to what became of the money is interesting but not material. In his affidavit, which afforded him full liberty to express himself, Hess did not say that he was mistaken in his former testimony, or that he did not understand the questions or the nature of the information sought, and did not in any way excuse, explain, or detract from the effect of his deposition. Reading the affidavit and the deposition together, he says he received the personal checks of Holmes for the insurance money, less attorney's fees, but not on the judgment against Conway. Leaving this subject at one
77 side, on February 24, 1911, Conway through his attorney paid to the clerk of the district court the sum of $500 as redemption money and took the clerk's receipt accordingly. Holmes could rightfully withdraw this money for no purpose unless to pay it to Harder. The draft for $575 which he cashed was redemption money also, and if not paid to Harder ought to be in the hands of the clerk. It is conceded that Harder received none of the money. The order therefore is a summary one made by the court in a pending proceeding to secure restoration to the treasury of the court of moneys arising from the litigation which the attorney has diverted.

The ultimate destination of the money is not now important. While the deposit when made is to innure to the benefit of Harder, the order was not made for his express benefit, but to protect the

integrity of the court itself in the course of the administration of justice.

It does not require the citation of authorities to demonstrate the jurisdiction of the court to exercise summary disciplinary power to enforce honorable conduct on the part of its own officers. Usually the power is invoked to compel attorneys to do justice toward their clients in matters connected with litigation, but it may be exercised to compel the performance of duties to others than clients, and it extends to any matter in which the attorney has been employed because of his professional character.

Lynde v. Lynde, 64 N. J. Eq. 736, 52 Atl. 694, 58 L. R. A. 471;

Anderson v. Bosworth, 15 R. I. 443, 8 Atl. 339, 2 Am. St. 910;

In re A Solicitor, 2 K. B. 539 (1907); 2 R. C. L. 1026.

Beyond this, however, the court has power to make disciplinary orders to remedy breaches of professional duty, independent of the rights of clients and others.

"The principle * * * is that the Court has a punitive and disciplinary jurisdiction over solicitors, as being officers of the Court, which is exercised, not for the purpose of enforcing legal rights, but for the purpose of enforcing honourable conduct on the part of the Court's own officers. That power of the Court is quite distinct from any legal rights or remedies of the parties, and cannot, there-
78 fore, be affected by anything which affects the strict legal rights of the parties. * * * So, if a solicitor obtains money by process of law for his client, quite irrespective of any legal liability which may be enforced against him by the client, he is bound, in performance of his duty as a solicitor, to hand it over to the client, unless he has a valid claim against it. If he spends it, or if, still having it, he refuses to hand it over, he commits an offence as an officer of the Court, which offence has nothing to do with any legal right or remedy of the client." (In Re Grey, 2 Q. B. 440, 443 (1892).

In the present case the court was acting in its own behalf to secure the return of money belonging in its own custody.

By the motion directed against the sheriff filed for his client, Harder, the attorney himself instituted the investigation of his professional conduct. That was the only substantial issue in the case, and he was fully heard, both as a witness and as an attorney, in justification of his course. The evidence which justifies the denial of an order against the sheriff justifies the order against him.

The judgment of the district court is affirmed.

All the justices concurring.

A true copy. Attest:

_____,

Clerk Supreme Court.

79 Be it remembered, that on September 15th, 1914, there was filed in the office of the clerk of the Supreme Court of

the state of Kansas a petition for rehearing on behalf of S. C Holmes, which petition for rehearing is in the words and figure as follows, to-wit:

80 In the Supreme Court of the State of Kansas.

No. 18792.

A. E. Hess et al., Appellants,
vs.
E. S. Conway, Appellee.

Petition of Appellant S. C. Holmes for Rehearing.

Appellant, S. C. Holmes, by Ferry, Doran & Dean and C. W Shinn, his attorney, presents this his petition for rehearing herein and prays that the Court grant the same for the following rea sons to wit:

First. The Supreme Court, through a misunderstanding of th facts disclosed by the record, and by a misconstruction of the law applicable thereto, has affirmed a judgment rendered against thi petitioner in a suit to which he was not a party, in which n service of any process, notice or demand of any kind was mad upon him, in which no petition, motion, affidavit, or any othe pleading, alleging any facts against, or asking any judgment o relief against this petitioner was filed in said cause, in which n hearing, trial, or other procedure was had through which this peti tioner has had his day in court, and in which no competent evi dence was introduced, and no opportunity given this petitioner t cross examine any witnesses.

That by reason thereof, the judgment rendered and affirme herein is in violation of the 14th Amendment of the Constitutio of the United States, which provides that:

"No state shall make or enforce any law which shall abridge th privileges or immunities of citizens of the United States, nor shal any state deprive any person of life, liberty, or property withou due process of law, nor deny to any person within its jurisdictio the equal protection of the laws."

81 This judgment is also in violation of Section 18 of th Bill of Rights of the Constitution of the State of Kansa which provides that:

"Persons for injuries suffered in person, reputation, or property shall have a remedy in due course of law, and justice administere without delay."

Second. Through a misunderstanding of the facts disclosed b the record, and erroneous inferences drawn therefrom, the Suprem Court has affirmed a judgment which is unsupported by any com petent evidence, and unsustained by the facts contained in the re ord, and thereby, if this judgment is permitted to stand, this pet tioner will be deprived of his property, and possibly of his liberty

without due process of law, in violation of the provisions of the 14th Amendment of the Constitution of the United States, above quoted, and of Section 18 of the Bill of Rights of the Constitution of the State of Kansas, above quoted.

The Supreme Court of the United States, in the case of Galpin v. Page, 85 U. S., 368, has held:

"It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court. By which is meant until he has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered."

The Supreme Court in its opinion in this case has undertaken to show that attorneys at law are not entitled to the protection of the 14th Amendment to the Constitution as interpreted in the above paragraph by the Supreme Court of the United States, but that they stand alone, and because of their peculiar position as officers of the court, may be deprived of their life, liberty, and property under what is termed by the court, "The summary disciplinary jurisdiction of the court," without a day in court, without an opportunity to be heard, and without a trial.

We cannot believe that the Supreme Court of Kansas desires to promulgate a rule of law by which the judges of the dis-
82 trict courts of this state, on their own motion, without citation, notice, pleading, or even oral suggestion, have summary disciplinary power to arbitrarily deprive a member of the bar of his property and liberty, without giving him a hearing or notice that he is on trial, and, in addition thereto, to establish a record which deprives him of his good name and denounces him to all the world as dishonorable and unfaithful to the trust reposed in him as an officer of the court.

Chief Justice Marshall, speaking for the Supreme Court of the United States, said, in Ex Parte Burr, 9 Wheat., 922:

"The profession of an attorney is of great importance to an individual, and the prospects of his whole life may depend upon its exercise. The righ to exercise it ought not to be lightly or capriciously taken from him."

Mr. Weeks, on Attorneys at Law, says, page 149:

"An attorney by his admission as such acquires rights of which he cannot be deprived at the mere caprice of the court, any more than a physician of the practice of his profession, a mechanic of the exercise of his trade, or a merchant of the pursuit of his avocations."

Yet, under the decision of the Supreme Court of Kansas in this case, Mr. Holmes, a member of the bar of this court, has been branded as guilty of "unprofessional and dishonorable conduct," without notice or a hearing in his own defense, and without his day in court, under the so-called "summary disciplinary power" of the district courts of this state announced for the first time through a journal entry prepared by the trial court on his own

motion, in a controversy between other parties, and in which the discredited attorney appeared only as attorney for the certificate holder in a motion to require the sheriff to execute a deed. The only evidence introduced by either party to this controversy, outside of the court record, was ex parte affidavits; and the universal rule is that even an attorney cannot be tried in a summary proceeding, where properly notified and charged, upon ex parte affidavits, for the reason that such ex parte affidavits are inadmissible, the lawyer having a right to confront and cross examine *and*
83 *cross-examine* the witnesses produced against him. (Union Building and Savings Association v. Soderquist, et al., 87 N. W. (Iowa) 433.)

That courts have summary jurisdiction over attorneys at law, to enforce honorable conduct and fair dealing between attorney and client, is admitted by all; but such summary jurisdiction is never exercised without giving the attorney notice and a hearing in his own defense, with a right to meet the witnesses against him face to face and to cross-examine them. The procedure in such summary jurisdiction is so well and clearly defined that it should be impossible for courts to be misled relative thereto. Thornton, in his recent work on Attorneys at Law, Volume 1, Page 615, Section 358, says:

"The usual practice is to present a verified petition, asking for a rule to show cause directed to the attorney commanding him to appear at a certain time to answer charges presented, the result sought being an adjudication. In some jurisdictions, however, the practice is regulated by statute, and the local laws must be consulted. Under any form of practice, the original petition must contain every fact essential to the exercise of summary jurisdiction. The petition may, of course, be amended under the usual practice rules. * * * The petition is presented as an independent proceeding, and the pendency of another proceeding is not essential."

Same, Section 349, Parties. The proceedings must, of course, be brought on behalf of the client or his agent, or executor, or administrator, etc."

Same, Section 360, Evidence. In summary proceedings against attorneys, the evidence on the hearing must be such as is admissible in civil actions, ex parte affidavits are inadmissible. The respondent is entitled to the privilege of cross examining the witness produced against him. As the judgment may conclude the right of the attorney without the ordinary procedure in legal controversies, it is essential that the petitioner should establish his cause to the entire satisfaction of the court. And where a demand is a prerequisite to the institution of a proceeding of this nature, the fact that such demand was made must be shown. * * * The attorney may be, and doubtless would be, permitted to show such mitigating circumstances as would have a tendency to exonerate him from proceedings for his punishment, and he is entitled to introduce all proper evidence, etc."

Same, Section 362, Defenses. The fact that a proceeding is a summary one does not deprive the attorney of any defense which he might have asserted in an action at law or a suit in equity instituted for the same end."

"Charges and accusations (against an attorney) must be clear, specific and circumstantial, that the attorney may know how to defend. General and vague charges are not sufficient. A specification that an attorney took legal papers belonging to the files of the
84 court is too indefinite as a charge. The time must be stated and the title of the case should be given. A charge so grave in its nature, and possibly leading to such serious results, must be stated with great particularity."

Weeks on Attorneys at Law (under Summary Jurisdiction), p. 156.

It is apparent from the above quotation that while courts have summary jurisdiction over attorneys practicing at the bar, that summary jurisdiction is never exercised without giving the lawyer notice of the charges lodged against him, appointing a time and place for hearing, and permitting him to meet and cross-examine the witnesses produced against him.

In this case, Holmes was not a party to the original action, nor to the motion to require the sheriff to execute a deed; on the latter, he simply gave his ex parte affidavits on behalf of Harder, and at no time was he either called upon to defend any charges lodged against him, or to answer any accusation either oral or written; and the Supreme Court surely does not with to establish a rule in this state excluding members of the bar from the protection afforded citizens by the 14th Amendment to the Constitution. This court certainly would not, it seems to us, wish to be placed in the attitude of denying a member of the bar a hearing, and to give lower courts unbridled authority, at their mere whim and caprice, under the cover of summary jurisdiction, without a hearing or day in court, to enter judgment against attorneys at law, depriving them of their property and subjecting them to the penalty of imprisonment for contempt of court should they neglect or refuse to comply with such arbitrary judgment. As for example, in the case at bar: The record not only does not show Holmes to have been guilty of any misconduct, but, on the contrary, shows that he at all times acted diligently, faithfully and honestly for the protection of the rights of the client in whose interest he was employed. Mr. Holmes was attorney for Hess, to foreclose certain deeds admitted to be mortgages. There were buildings on the lands being foreclosed. One of them burned, after judgment and prior to sale. The plaintiff, Hess, realizing that the property was inadequate to satisfy his judgment of
85 $2612.00, with the interest accruing thereon, began a number of proceedings by motions to compel the insurance of the buildings, and to compel the application of the proceeds of the insurance, in case of fire, to the satisfaction of his judgment. The first of these motions was filed on October 1st, 1910, (Abstract, page 3), asking for the appointment of a receiver to take charge of, insure, and care for the property in controversy in the foreclosure proceedings, on the ground that the property was insufficient to discharge the mortgage debt. This motion being overruled by the court, said plaintiff, Hess, through his attorney, Holmes, renewed his efforts to secure insurance on the property, by again, on Novem-

ber 23, 1910, (Abstract page 4) filing a motion for the sole purpose of procuring insurance on said property, to protect and satisfy his judgment; and this motion having been overruled by the court, he again, on January 9, 1911, filed a motion in said court (Abstract page 4), to require said defendant, E. S. Conway, to deposit with the Clerk of said court the insurance policies upon the hotel at Yates Center, Kansas, and to pay into court any money received from said insurance, the hotel located upon said property having been destroyed by fire on December 30, 1910. All of these proceedings were had prior to the sale, and prior to any agreement made between counsel for plaintiff and defendant relative to the application of the insurance money. Upon the filing of the latter motion, the Judge of the trial court, on the 9th day of January, 1911, (Abstract page 5), made and caused to be filed an order restraining and enjoining the defendant, Conway, from in any way disposing of the insurance policies on the buildings on said mortgaged premises, or disposing of any moneys collected thereon, and fixing January 16, 1911, for the hearing of said motion; which order was duly served upon the defendant, E. S. Conway. It must be, and is admitted, by the courts and all parties to this controversy, that up to this time, at least, Holmes was in good faith, persistently and consistently striving to secure the application of the insurance on the properties to
85½ the satisfaction of Conway's indebtedness to Hess. It is conceded by this court that three days prior to the sale, namely: on January 16, 1911, Holmes, as attorney for Hess, and Hogueland, as attorney for Conway, met and made an agreement by which the money collected on insurance policies was to be paid into court. The supreme court in its opinion finds that this agreement, whatever it was, was made by Holmes and Hogueland "on the eve of the sheriff's sale," or prior to the sheriff's sale; or, as the court directly states in its opinion (page 2 thereof), "this arrangement was made three days before the sale was to take place."

Holmes contends that by the terms of this agreement, the insurance money was to be paid into the Clerk's office to be applied in satisfaction of the judgment. Hogueland says that Conway was endeavoring to compromise with said insurance company his losses; and when Conway was informed by Hogueland that Holmes was taking further action to recover the insurance money, Conway told Hogueland he intended to apply said money on the redemption of the property. Hogueland then swears that:

"Affiant called S. C. Holmes by 'phone, and told him the substance of what Mr. Conway had said, and the said Holmes replied that if affiant would personally see that the money was turned over, the matter would be satisfactory, and affiant agreed to it." (Abstract p. 15).

Hogueland further states in his affidavit:

"That affiant had no interest in the matter except to observe the instructions of said Conway and to keep his agreement with said Holmes. That affiant had no knowledge that said Holmes ever denied or claimed that said money was not paid in redemption of said property until two or three days after the period of redemption had

expired, and that he heard from outside rumons." (Abstract page 16).

Hogueland nowhere swears that he made any agreement or contract with Holmes by the terms of which the insurance money was to be applied to the redemption of the property. We doubt if it can be consistently claimed that even such inference can be drawn from Hogueland's affidavits.

In another affidavit (Abstract pp. 17 & 18), Hogueland states:

86 "That he has no recollection of the presentation of such stipulation, or ever having seen it."

Referring to the stipulation which Holmes claims was made, and was to be signed and filed in the case, showing that the insurance money was to be applied on the judgment, and a copy of which stipulation Holmes and his sister say was actually served upon Hogueland. Hogueland does not say that the stipulation was not agreed upon, or that it was not actually presented to him, as contended by Holmes and his sister. Hogueland only says that he has no recollection of the presentation of the stipulation, or ever having seen it. In addition to this, Hogueland, in this affidavit (Abstract p. 18) says:

"That he called Holmes and said to him, in substance, that no legal proceedings would be necessary; that Conway intended to apply everything received in the way of insurance, and the said Holmes said that we could stipulate to leave the policies with the clerk of the court, or that they may be left with you, if you will see that the money is applied, and affiant said, all right, and had Conway bring the policies of insurance, and after compromising deposited the money as hereinbefore stated."

Hogueland nowhere in this affidavit, or in any other, says that the money was actually to be applied on redemption of the property, or that it was not to be applied on the judgment, as contended by Holmes. All that he says, in addition to what we have quoted above, is that there was nothing in the conversation with said Holmes about applying said money of any excess judgment in favor of the plaintiff. Hogueland further says:

"Affiant can't give the date of the conversation, but believes it took place before the property was sold, and the money paid afterwards."

It will be seen from the affidavits of Holmes and Hogueland and Mr. Holmes' sister, the only persons who know anything about this agreement, that Holmes' statement is contradicted or questioned only by inferences drawn from the affidavits filed by Hogueland, and not from any express denial of any statement made by Holmes. The Court has said in its opinion:

"There are some serious disputes in the briefs concerning the true facts in the case. It would serve no beneficial purpose to print the evidence and to discuss it at length, as would be necessary if it were discussed at all. There are some unfortunate conflicts

87 of testimony to be resolved, and some inferences are to be derived from pregnant facts and circumstances, and from

failure to frankly clear up some matters left in doubt. Consequently the facts upon which the questions of law arise will be stated as the Court evidently found them by its general finding in favor of Conway, in which finding the Court is constrained to concur."

We ask and respectfully request that the Supreme Court examine the evidence in this case, and pass upon it upon its own investigation and consideration thereof, and that it be not bound by the decision of the lower court. It seems to us that the good name of a member of the bar of the Supreme Court is a sufficiently important matter to warrant the examination of the entire record in this case by the Supreme Court, and this we respectfully request and insist upon, that what seems to us to be a great injustice may be undone.

The entire record in this case is before the court in substantially the same form as presented to the District Court, and is in writing either in the form of pleadings, court records, or affidavits. No witness testified orally, and this court has repeatedly held that while the decision of the lower court is entitled to consideration,

"Where the case comes to this court on written or documentary evidence, practically as it was presented in the district court, this court must decide for itself what the facts establish substantially as it would if the case was originally brought in this court."

Matthewson v. Campbell, 91 Kan., 627;
Moore v. Page, 10 Kan., 246;
Robinson v. Melvin, 14 Kan., 484;
Durham v. C. C. & M. Co., 22 Kan., 232;
Bank v. McIntosh, 72 Kan., 603;
Belknap v. Sleeth, 77 Kan., 164.

We are frank to confess that a casual reading of the record in this case might easily mislead one to believe that there was something wrong; but a careful study of the record discloses that Mr. Holmes was employed by Hess to foreclose two mortgages on real estate; that in the prosecution of these foreclosures he was vigilant cannot be denied. That time after time he persistently insisted upon securing the application of any money derived from insurance on the properties in question to the payment of the judg-
88 ment. At the time of the agreement between Holmes and Hogueland, on the 16th of January, 1911, the sale had not been had. There was no outstanding certificate from which to redeem. The only thing to which the insurance could be applied was the satisfaction of the judgment, and Hogueland says that at that time he told Holmes over the phone, in substance, that no legal proceedings would be necessary. That Conway intended to apply everything received in the say of insurance. To what at that time could he have applied it? To nothing but the judgment. It was the application of this money to this purpose for which Mr. Holmes had so long and persistently struggled, notwithstanding the adverse rulings and decisions of the court. Why should Holmes and Hogueland at that time make an agreement by which a part of Hess' security, the insurance money, should be applied to the future

redemption of the property for Conway, leaving Hess' judgment of $2700.00 unsatisfied?

Just as soon as Mr. Holmes was informed that the money was paid in to the Clerk's office, he sent his sister, who had delivered the stipulation to Hogueland, for it. A receipt was given (Abstract, page 9), showing that the money was drawn to apply on judgment, the purpose to which Mr. Holmes had for months fought to have it applied. The very next day, he forwarded the money to his client, Hess, less fifty dollars retained as attorney's fee. When the second installment of insurance money, $575.00, was collected by Hogueland, and turned over to Holmes, Holmes gave a receipt to Hogueland (Abst. p. 10) showing that he had received it to apply on the judgment. This receipt was dated March 31, 1911, and yet Hogueland claims in one of his affidavits (Abstract, p. 16) that:

"He had no knowledge that Holmes ever denied or claimed that said money was not paid in the redemption of said property, until two or three days after the period of redemption had expired, and that he heard from outside sources."

This may only establish that Hogueland was careless, but the fact remains that Holmes was acting consistently all the way through, with an honest belief that the money collected from
89 the insurance policies was to be applied to the satisfaction of the judgment. When the Court has carefully examined the record in this case, as it should under all the circumstances, it will be convinced, as we are, that Holmes not only acted honestly, but diligently and faithfully and persistently for the protection of his client, Hess, and that he at no time believed that an agreement had been made by which the insurance money should be applied to the redemption of the property for Conway. And it may be well to suggest that unless there is found to be moral turpitude on the part of Mr. Holmes in this transaction, the whole judgment against him falls; for the court would have no jurisdiction, even on summary hearing after notice, to find an attorney guilty of dishonorable conduct when the record clearly shows that he had been honest and straightforward in all his transactions.

We are convinced that the Supreme Court has been misled into believing that Holmes was guilty of unfaithfulness and breach of agreement, by erroneous inferences drawn from the erroneous findings of fact by the court below. For example: the Supreme Court in its opinion finds that Hess, in answering interrogatories under oath, stated that Holmes had not sent him any money on the Conway judgment since February 24, 1911; and that the interrogatory following, asking him to state when and how much he had received from Holmes on the Conway judgment, if any had been received, was left unanswered; and that Hess made an affidavit, some months later, stating that he had received from Holmes personal checks for the proceeds of the insurance money, which he cashed; and therefrom draws the conclusion or inference that he did not modify his former testimony.

It is apparent that the Supreme Court believes that Hess was in collusion with Holmes, and received this money on some other

account than the judgment to which he, through Holmes, so long fought to have it applied. This shows the danger of drawing inferences from partial knowledge of the facts. Since Mr. Holmes
90 has been tried and condemned without notice or hearing, we are attaching hereto, as Exhibit "A," copies of letters written by S. C. Holmes to A. E. Hess, and his attorney, and copies of letters received from them by S. C. Holmes, and copies of proceedings had in the District Court of Woodson County, Kansas, all relating to insurance on the properties foreclosed, and the recovery of money from said insurance for said A. E. Hess. These letters include copies of the checks sent by Holmes to Hess, which have written across their faces, "Hess vs. Conway," also copies of the letters of transmissal which accompanied them, also copies of Mr. Hess' acknowledgment of the receipt of these remittances, and each and all of them show or tend to show that the remittances were made to apply on the Conway judgment. Exhibit "A" contains the evidence which Mr. Holmes would or could have presented to the court, had he been on trial, in his own defense, under charge of unfaithfulness to his duties. We ask the members of the Court to read the documents set out in Exhibit "A," and if they will do so, we believe they will be convinced, with us, that Mr. Holmes not only acted in good faith, but was more than ordinarily diligent in protecting the interests of his client.

Much force is given the certificate of the Clerk of the trial court, which shows that Holmes had been attorney for the Harders a great many times within a given period, and this court, in its opinion, says:

"The Clerk of the Court made the following certificate, which was read in evidence."

Whereas, said certificate shows on its face (Counter Abstract, p. 11), that is was not made until the 12th day of February, 1914, almost one year after the last hearing on the motion to require the sheriff to execute a deed, which occurred on the 17th day of February, 1913. In other words, the Supreme Court was mislead by the introduction of this evidence into the abstract long after the trial; and the judgment blackening the good name of this petitioner was not only rendered without a hearing and without competent
91 evidence, but is made ridiculous by being dependent upon a defamatory certificate which was made after the trial, and was not in evidence at all.

The facts are that the Harders have been parties to only seven suits in that district court within the past twenty years, and there is nothing to show that said suits were not entirely legitimate, or that Mr. Holmes' connection therewith was not honorable in every respect. See certificate of the Clerk attached hereto, marked "Exhibit B."

The Clerk's certificate which the Court was led to believe had been read in evidence was employed for one of two purposes: (1) To leave the false inference or impression that the Harders had been contentious and litigious, and that Holmes was corrupt because he had acted as their attorney; or, (2) That because Holmes

l appeared for the Harders so many times within a given period, t the inference could be drawn that he had continuous employ- nt by them, and that therefore he must have been employed by m from the time the certificate in question was issued. It is now wn how unfair it was to draw such inferences from a false certifi- which Mr. Holmes has never had an opportunity to answer or stion.

This court in its opinion says that the property involved is esti- ted to be worth $3500.00, and that,

"If redemption did not occur Harder would be the beneficiary a good bargain."

By such ruling, the court in effect held that the value of the prop- was fixed by the ex parte affidavit of Conway. Whereas, as matter of fact, the property never has been and is not now worth $1700.00; and the best evidence that it was not worth more n that amount is the fact that it did not sell for more than 00.00 on a duly advertised sale. An examination of the affi- it of Conway, set out in Exhibit "A", attached hereto, shows that swore that,

"The property in section 7, township 25, range 16, East, is of the value of $3500.00."

And in the same affidavit he swore:

"That the property in Yates Center, Kansas, is situated ly upon property described in said petition, and partly upon railroad right of way, and is of the value of $2500.00."

This would make both properties worth $6,000.00. What de- dence can be placed upon such testimony given in an ex parte davit by Conway? The truth is that Mr. Harder is perfectly ing now, and has at all times been willing to allow Mr. Conway redeem by paying him $1,700.00, the amount bid at the sale, interest thereon. If the property is worth $6,000, as sworn y Mr. Conway, then he will be the gainer by the difference be- en $6,000 and $1,700, and he owed the money paid Hess on excess judgment, and there is no excuse for his not paying his obligations. So he is not entitled to any sympathy whatever his matter.

n addition to this, if the judgment as affirmed is permitted to d, we have the following situation: A party having judgment more than $2,700, including interest, a specific lien upon prop- of the value of $6,000, or $3,500, as the Court wishes to in- ret the affidavit of Conway, and having made an agreement that proceeds of the insurance should be applied to the redemption, enabling the debtor to redeem for the difference between the eeds of the insurance and the amount for which the property ld sell, allows the property to sell for $1,700 and to be re- ned for $625.00 in addition to the insurance money, leaving 00 or $3,500 worth of property free, and more than $1,000 of judgment unpaid. It is evident from this statement that this t misapprehended the facts in this record. Again, the Supreme rt in its opinion says:

Holmes knew that the insurance money would go to redeem the

land and not to satisfy the excess judgment. This is the turning point in this case."

Under the facts disclosed by the record, when correctly examined, we find that Holmes had no such knowledge as is attributed to him.

It is therefore apparent that the Supreme Court erred in ruling that, "this is the turning point in the case.

93

It is idle to discuss the imputation of the knowledge of Holmes to Harder, as Holmes in fact had no such knowledge to impute or to convey to Harder, and it is axiomatic that knowledge which does not exist cannot be imputed. It is therefore futile to indulge in presumptions of law which have no foundation in fact. And this Court in its opinion says:

"Mr. Holmes claims he understood the agreement with Hogueland differently. After a careful consideration of all the strong arguments for his view of this case, as already stated (the Supreme Court) feels that the trial court was best able to determine the matter."

This statement makes it clear that the Supreme Court was misled as to the facts disclosed by the record, and by the judgment of the lower court, upon which the Supreme Court's decision is finally made to rest. It therefore follows that if justice is to be justly administered in this case, the Supreme Court must examine the evidence for itself.

It may be said that the judgment rendered against Holmes does not deprive him of his property: that it only requires him to return the money which he paid to Hess; but this fallacy cannot be indulged, as Holmes justly and in good faith paid the insurance money to Hess on his excess judgment. Hess is now a non-resident of the State of Kansas, and was at the time the judgment was entered against him, and if this money is to be returned, it must be returned from the private estate of Holmes. It might be pertinent to inquire by what jurisdiction or authority the trial court entered judgment against Hess for return of this money. He was not in court at the time, but was a non-resident of the State, and so far as the record shows had no notice whatever of the hearing or of the fact that he would be called upon to return money which had been paid to him on a debt which was justly due him. No notice to him whatever is shown, unless we indulge in a further inference that Holmes' employment continued after he had performed

94

all the duties of his employment. He had foreclosed the mortgages and collected the debt due on the Hess judgment, and his employment had terminated long prior to the hearing on the motion to require the sheriff to execute a deed to Harder.

Great stress is laid upon the fact that the insurance money slightly overpaid the judgment to Hess. The record in this case, and the evidence attached in Exhibit "A", disclose that this overpayment was an oversight, and that Mr. Holmes at the time he made the payment believed that there was a small balance still due, as his letter in Exhibit "A," transmitting the last installment of the insurance money, dated April 15, 1911, says:

"Mr. A. E. Hess, Oklahoma City, Oklahoma.

"DEAR SIR: —In Hess v. Conway, I am pleased to report that by keeping up a vigorous warfare I have received the balance due on the insurance, $575.00; I have retained $25.00 fees and inclose you my check herein for $550.00 in full settlement. I will now go after him for the small balance still on the judgment and the additional he seems to owe you under the contract. I am,

Respectfully yours,

S. C. HOLMES."

This letter specifically says that Holmes will "now go after him (Conway) for the small *g*alance still due on the judgment, and the additional he seems to owe you under the contract." The last part of this sentence refers to $1,000 which Hess agreed to throw off of his account against Conway, if he were paid the balance at a certain time; which payment Conway failed to make, as he had agreed, and Hess contended and insisted that the $1,000 was therefore still due him, and he was beseeching Holmes to use the same vigilance in collecting this that he had used in securing the application of the insurance money to the judgment.

Further discussion of the merits of this case in this petition, is, it seems to us, useless. That the Supreme Court should and will grant a rehearing in this case is so apparent that we respectfully submit this petition without further statement or argument.

L. S. FERRY,
T. F. DORAN,
J. S. DEAN,
C. W. SHINN,
Attorneys for Appellant S. C. Holmes.

95 Explanatory:

We deem it proper to inform the court that Mr. Holmes has made every effort possible to secure the affidavit or deposition of Mr. A. E. Hess, showing that he actually received the insurance money and applied it on the judgment, to remove the doubt which seems to linger in the minds of the members of the Supreme Court on this question. Mr. Holmes has only recently succeeded in locating Mr. Hess in one of the Northwestern states, at a small town in said state, but the time allowed by the Court in which to secure and file his affidavit or deposition was inadequate, and we were forced to file this petition without attaching the same. If a rehearing is granted, Mr. Holmes will either secure Mr. Hess' affidavit or take his deposition, to make this point clear, and to remove from his good name the stigma that has been placed upon it by the judgment in this case.

We, however, feel that the record as now presented in this petition for rehearing clearly establishes the fact that Mr. Hess received the insurance money and applied the same on his judgment. Originals of documents filed in Exhibit "A" will be produced if the Court desires.

Respectfully submitted,

FERRY, DORAN & DEAN,
Attorneys for S. C. Holmes.

96 "EXHIBIT A."

In the District Court in and for Woodson County, Kansas.

Supreme Court, #18792.

A. E. HESS, Plaintiff,
vs.
E. S. CONWAY et al., Defendants.

Copies of letters written by S. C Holmes to A. E. Hess and his attorney, and copies of letters received from them by the said S. C. Holmes, and copies of proceedings had in the District Court of Woodson County, Kansas, all relating to insurance on the property foreclosed, and the recovery of moneys from said insurance for the said A. E. Hess.

97 In the District Court in and for Woodson County, Kansas.

A. E. HESS, Plaintiff,
vs.
E. S. CONWAY et al., Defendants.

Motion.

Comes now the plaintiff, A. E. Hess, by S. C. Holmes, his attorney, and hereby moves the court to appoint a receiver herein to take charge of, insure, rent, protect and care for the property in controversy herein, for the following reasons, to-wit:

1. Said property covered by said mortgage is insufficient to discharge said mortgage debt.
2. Said property is in danger of being materially injured, is being neglected, is not occupied by tenant, repairs and improvements not being kept up.
3. Insurance is not being kept on said premises, and the same cannot be kept insured without the appointment of a receiver, and said property is practically valueless except for the buildings thereon.
4. The taxes are not paid upon said premises and additional taxes will soon be assessed against them.
5. The interest is not kept up on said mortgage, and the principal is past due.

S. C. HOLMES,
Att'y for Plaintiff.

Filed Oct. 1, 1910.

98 (*Copy of Affidavit of E. S. Conway, with Caption Omitted, Filed in Resistance of said Motion.*)

E. S. Conway, being first duly sworn says, that he is the owner of the property sought to be foreclosed in this action. That the property in section 7, township 25, range 16, East, is of the value of $3500. That the taxes are fully paid thereon.

That the property in Yates Center, Kansas, is situated partly upon the property described in said petition and partly upon the Railroad Right of Way and is of the value of $2500. That there is a controversy over how the same should be taxed with the County Treasurer, whether the same was assessed as personal or real estate and there is some question whether the tax is paid upon this property, but affiant says that he is able and willing to pay any legal and proper tax assessed against said property.

Affiant says that the Durand property is insured and always has been for $1500.

That the buildings in Yates Center, Kansas, are insured in the sum of $3500.

Affiant further says that he expects to pay the plaintiff's mortgage in full.

E. S. CONWAY.

Subscribed and sworn to before me, this 6th day of October, 1910.

[SEAL.] M. E. PAYNE,
Notary Public.

My commission expires January 27, 1914.

Filed October 8, 1910.

Notice given and hearing had Oct. 8, 1910, and the motion overruled with leave to the plaintiff to renew such application at some future time if he desires. To which plaintiff excepts.

99 October 14, 1910.

Mr. A. E. Hess, Perry, Okla.

DEAR SIR: In Hess vs. Conway, the court has refused to grant a receiver. I presume he puts it on the ground that the property will pay the debt. I want to again make an application and I enclose you an affidavit which please execute and return to me. I am,

Respectfully yours,

S. C. HOLMES.

Dic. S.

PERRY, OKLA., October 25, 1910.

S. C. Holmes, Yates Center, Kansas.

DEAR SIR: Mr. Hess was in today and made the affidavit set out by you and forwarded to him and gave check for $15.00 which we are sending you, and you will please find both check and affidavit

inclosed. I trust it will succeed in bringing results. If not, please let us hear from you and we will try to supplement matters with any other proof that you may need on any subject that should be covered.

Truly yours,

HENRY S. JOHNSTON.

PERRY, OKLA., November 15, 1910.

S. C. Holmes, Yates Center, Kansas.

DEAR JUDGE: Mr. Hess has been anxious to hear from you since you have made the second presentation of the application for injunction in this case. He is exceedingly anxious to have the buildings insured and keep it insured and wants you to tend to that matter as soon as it is in shape so to do. He further asks me to make inquiry about the taxes on the premises. He is exceedingly anxious to crowd the matter. Also advise when you have your term of court in that county. Kindly advise me on the situation and oblige.

Truly yours,

HENRY S. JOHNSTON.

100 November 18, 1910.

H. S. Johnston, Att'y, Perry, Okla.

DEAR SIR: In Hess vs. Conway, answering your favor of the 15" inst., permit me to say: I am pleased to advise you that I have taken judgment for the entire amount of money due Mr. Hess and we will have a sale on the place at an early date. Mr. Conway has filed an affidavit in which he claims to have all the property insured, hence I doubt if the court will appoint a receiver. Will, however, take the matter up within a few days. I am,

Respectfully yours,

S. C. HOLMES.

Dic. S.

PERRY, OKLA., November 21, 1910.

S. C. Holmes, Yates Center, Kansas.

DEAR SIR: I was indeed glad to get your letter this morning telling me that you had taken judgment in the case of Hess vs. Conway; also the fact the parties claim the place is insured. This will be considerable relief to Mr. Hess' mind. I wish you would in your application for receiver, put this gentleman on the witness stand and see if it be a fact that he is insured and get the names of the companies and ascertain whether or not Mr. Hess' interests are fully protected. I believe you are attending to the matter all right, but of course Mr. Hess feels very apprehensive on account of the value of the improvements meaning so large a portion of the entire property. Failure to have insurance would practically mean that Mr. Hess is at the absolute mercy of the defendant.

Truly yours,

HENRY S. JOHNSTON.

101 (*Copy of Motion Filed by Plaintiff, A. E. Hess, November 23, 1910, with Caption Omitted.*)

Comes now the plaintiff, and moves the court to appoint a receiver herein, for the sole purpose of insuring said property, and authorized to insure the property in controversy herein, for the following reasons, to-wit:

1. Said property consists of two hotel properties that is worth but little except for the buildings located thereon.
2. Plaintiff has no insurance upon said property, or his interest therein, nor can he obtain it without the appointment of a receiver.
3. No insurance can be written upon said property while it is in litigation without the appointment of a receiver, nor will any insurance company continue a policy upon said buildings after notice is brought to them of the condition of said title, without the appointment of a receiver.

S. C. HOLMES,
Att'y for Plaintiff.

(*Copy of Affidavit Filed by Plaintiff November 29, 1910, Caption Omitted, in Support of said Motion.*)

W. P. Taylor and Thos. W. Plummer being duly sworn, on *our* oaths say: That they are engaged in the real estate business in Yates Center, Kansas, and are acquainted with the value of real estate in this vicinity and are engaged in writing fire insurance and are acquainted with the rules and regulations of the companies with reference to writing insurance on property in litigation, and the title being in the condition that it is in the case of Hess vs. Conway et al.

Affiants further aver that said property, aside from said buildings, is not worth to exceed $800.00.

Affiants further aver that in their judgment no company will write the insurance upon said property in the present condition and would cancel any insurance thereon had the same been written when knowledge was brought to it of said litigation and the condition of said title.

Affiants further aver that in the present condition of said property and title, no insurance can be obtained in their judgment for the plaintiff.

Affiants further aver that if a receiver is appointed, in their judgment, insurance can be written and carried upon said property.

W. P. TAYLOR,
THOS. W. PLUMMER.

(Regularly subscribed and sworn to.)

November 30, 1910, hearing was had upon said motion, and the same overruled and denied, with leave to the plaintiff to renew said motion at a future time if circumstances justified it.

102 OKLAHOMA CITY, November 29, 1910.

Mr. Holmes, Yates Center, Kans.

DEAR SIR: I have moved to Oklahoma City and haint heard from you for a long time and would like to know what you have done in the Conway case by this time. I left Mr. Henry Johnston in Perry to find out from you what you had done and keep me posted I haven't heard anything from him I suppose you have had the case tried by this you told me you would when I was there now I want you to let me know what you have done whether you had a receiver pointed yet and the rents collected and taxes paid and buildings insured Please let me know by return mail and oblige.

Yours respectfully,

A. E. HESS,
Oklahoma City.

December 1, 1910.

Mr. A. E. Hess, Oklahoma City, Okla.

DEAR SIR: In Hess vs. Conway, answering your favor of the 29″ ult., permit me to say: I have recently answered a letter or two from Mr. Johnston. I beg to advise you that on the first day of the term of court I took judgment for you for $2,612.00, the same to draw interest at 10% from November 16, 1910. I have made two applications for the appointment of a receiver but the court has refused to appoint one for the reason that the property is worth more than the judgment. I tried to get some one appointed to insure the property, but Conway claims that it is insured, and I have notified the agent that in case of loss we will look to the company. Conway stated that you had a policy; if that is correct, send it to me. I am,

Respectfully yours,

S. C. HOLMES.

Dic. S.

102*a* December 1, 1910.

Mr. J. C. Culver, City.

DEAR SIR: In Hess vs. Conway, in which mortgage has been foreclosed on the hotel at Durand and the one in the western part of this city, I am advised by Mr. Conway that you have written the insurance in his name and that no mortgage clause is attached. You are hereby notified that in case of loss, Mr. Hess, the mortgagee, will look to the company for the payment of his judgment in the sum of $2,612.00, together with interest thereon at 10% per annum from the 16″ day of November, 1910, and costs and taxes. I am,

Respectfully yours,

S. C. HOLMES.

Dic. S.

102*b* OKLAHOMA CITY, Dec. 5th, 1909.

Mr. Holmes, Yates Center, Kan.

DEAR SIR: Got your letr and glad you ar so far long with the case How long can He stay the jugement I Have No Policy on those Bildings or Never Had and He Knoes so i want to know Hoo gets the rent and Hoo Pays the taxes Please let me Heare from you soon.

Yours res.,

A. E. HESS.

102*c* December 5, 1910.

Mr. A. E. Hess, Oklahoma City, Okla.

DEAR SIR: In Hess vs. Conway, answering your favor of the 5" inst., permit me to say: We will have the sale in about a month and Conway will then have eighteen months redemption, but I shall endeavor to get some one else to buy the property which will thus enable you to get your money and be out of it. Conway is collecting the rent and has paid the taxes. I am,

Respectfully yours,

S. C. HOLMES.

Dic. S.

103 December 31, 1910.

Mr. A. E. Hess, Oklahoma City, Okla.

DEAR SIR: I beg to advise you that fire last night destroyed the old Conway hotel at the old depot. Conway stated in court a few days ago that there was $3,000.00 insurance on it. I will at once take steps to garnishee the insurance company. I am,

Respectfully yours,

S. C. HOLMES.

Dic. S.

December 31, 1910.

Mr. A. E. Hess, Oklahoma City, Okla.

DEAR SIR: If I remember right, you told me once that Conway agreed to carry insurance on the hotel; if that is true, please sign and forward me by return mail the inclosed affidavit; if there was any amount agreed upon, you can have the attorney write that in. Get it to me as early as possible, as I want to go after the insurance money. I am,

Respectfully yours,

S. C. HOLMES.

Dic. S.

January 3, 1911.

Amer. Insurance Co., Newark, N. J.

GENTLEMEN: I am advised that you have $1,000.00 insurance on the old western hotel in this city, now called the Mo. Pac. hotel,

which has recently been destroyed by fire. I represent the holder of a deed to the property upon which judgment of foreclosure has been entered, and I take this method of notifying you that we claim the insurance. Will you please let me hear from you by return mail. I am,

Respectfully yours,

S. C. HOLMES.

Dic. S.

(Similar letter sent to Mechanics Ins. Co. Philadelphia, Pa.)

103*a* OKLAHOMA CITY, Jan. 4th, 1911.

Mr. Holmes, Yats Center, Kan.

DEAR SIR: Got your letr today in closed please find afadafed wich Mr. Conway a greed to cary $1,500 on the Property that Burned I expect to Heare of that any time that was the reason i wanted you to Have it insured. Well i Hope you will get after it at once pleas let me now wat you dew or can get and oblige your truly.

A. E. HESS.

104 The above will show the effort made by A. E. Hess, plaintiff, to obtain insurance on said property, on two occasions prior to the fire, and also shows that said property was worth but little aside from the buildings.

The hotel property in Yates Center, Kansas, was destroyed by fire December 30, 1910.

On January 9, 1911, the plaintiff, A. E. Hess, filed in court a motion, supported by the affidavit of the said A. E. Hess, which, caption omitted, is as follows, to-wit:

Comes now the plaintiff, A. E. Hess, by S. C. Holmes, his attorney, and moves the court to require the defendant E. S. Conway to deposit with the clerk of said court the insurance policy upon the hotel in Yates Center, Kansas, upon which mortgage has been foreclosed herein, and to pay in to the clerk of said court any moneys received from said insurance, and file in said court a statement showing the names of all the companies carrying insurance on said hotel, and the amount carried by each, and that the same be done within twenty-four hours after the service of an order upon the said defendant, E. S. Conway, for the following reasons, to-wit:

1. It was agreed between plaintiff and defendant when the loan which is foreclosed herein was obtained that insurance would be kept upon said building for the use and benefit of said plaintiff.

2. Plaintiff is the equitable owner of said insurance policy, and the equitable owner of all moneys due by reason of any loss under said policy, having an equitable lien upon said policy and any moneys due thereunder.

3. The remainder of the property covered by said mortgage is wholly insufficient to pay and discharge the judgment rendered herein.

S. C. HOLMES,
Att'y for Plaintiff.

A. E. Hess, being duly sworn, on his oath says: That he is the plaintiff in the case of Hess vs. Conway, et al., now pending in the District Court in and for Woodson County, Kansas, and is the owner of said judgment.

Affiant further avers that he has just been informed of the destruction by fire of the hotel building in Yates Center, Kansas, located near the old Missouri Pacific depot, and covered by the judgment of foreclosure herein.

Affiant further avers that in his judgment the remainder of said property is not worth and will not sell for a sum sufficient to pay and discharge the judgment rendered herein.

Affiant further avers that when he made said loan to the said E. S. Conway the said E. S. Conway verbally agreed with said plaintiff to carry on said buildings a reasonable amount, $1,500.00 of insurance for the use and benefit of affiant, plaintiff herein; affiant does not know in what companies said insurance is written; and that said agreement upon the part of said E. S. Conway was one of the reasons which caused said plaintiff to make said loan, and without which said loan would not have been made. Further affiant saith not.

(Sworn to.)

A. E. HESS.

104½

January 7, 1911.

Hon. Oscar Foust, Iola, Kansas.

DEAR SIR: In Hess vs. Conway, in which I have tried so hard to get a receiver in order that I might get some insurance to protect my client, the hotel near the old depot burned; Conway stated before you at the last term of court that he had $3,000.00 insurance on it and I don't think there is a man in town who would say it was worth $1,500.00. I can't get who the insurance companies are who have this insurance and it is a matter of very great importance to my client. Inclosed I hand you a motion and I trust you will make an order in keeping therewith. This can in no manner harm anyone and my client is entitled to it; sorry I did not receive this in time to present it to you while you were here. I am,

Respectfully yours,

Dic. S.

S. C. HOLMES.

IOLA, KANSAS, Jan'y 7th, 1911.

Hon. S. C. Holmes, Yates Center, Ks.

DEAR HOLMES: In re Hess vs. Conway et al. I have made an order such as I deem proper at this time in case—have forwarded same with motion to Clerk of Court—by this same mail—You had best at once see that notice of hearing is given as in order specified. I beg to remain,

Yours truly,

OSCAR FOUST.

105 On January 7, 1911, the Judge of said court made an order in said cause, on said motion, which was duly served upon E. S. Conway and filed in said cause January 9, 1911, which, caption omitted, is as follows, to-wit:

Be it remembered that on this 7th day of January, 1911, before me at Chambers in the city of Iola, Allen County, Kansas, the plaintiff presents to me his motion asking that the defendant E. S. Conway be required to "deposit with the clerk of said court the insurance policy upon the hotel in Yates Center, Kansas, upon which mortgage has been foreclosed herein, and to pay to the clerk of said court any monies received from said insurance, and file in said court a statement showing the names of all the companies carrying insurance on said hotel, and the amount carried by each, and that the same be done within twenty-four hours after the service of an order upon said defendant,"—for reasons stated in said motion filed herein—with affidavit of plaintiff attached to such motion in support thereof.

After due consideration of such motion and affidavit in support of same, I find that in justice and equity and to properly protect the rights of respective parties hereto a hearing upon due notice to defendant should be had and that in the meantime and until such hearing, a restraining order to protect all interests should be made.

It is therefore ordered and directed that the said motion of plaintiff will be heard before me at Chambers in the courthouse at Iola, Allen County, Kansas, on Monday, the 16th day of Jany. 1911, at 1:30 P. M. of said day; and that in the meantime and until otherwise ordered by the court *of* Judge the defendant E. S. Conway be and he hereby is restrained and enjoined from in any manner disposing of any insurance policies upon buildings upon mortgaged premises herein, or of any monies that he may have collected on any such policies—but that he hold same to abide the further order of the court or Judge thereof.

It is further ordered and directed that a duly certified copy of this order be served upon the said E. S. Conway defendant, and such service of copy of order upon him shall be a sufficient notice of the time and place of the hearing of such motion.

It is further ordered and directed that such motion will be heard upon affidavits, records, files and documentary evidence.

Done at Chambers at City of Iola, Allen County, State of Kansas, January 7th, 1911.

OSCAR FOUST, *Judge.*

Received this order this (7) day of January, 1911, served the same in said county by delivering a copy to E. S. Conway, personally, this 7th day of January, 1911.

S. E. MARTIN, *Sheriff.*

105½ January 14, 1911.

Hon. Oscar Foust, Iola, Kansas.

DEAR JUDGE: In Hess vs. Conway, in which I served the order made by you with reference to insurance, the parties have consented

to the same and we will agree upon an order or journal entry which I will send you Monday. I am,

Respectfully yours,

Dic. S. S. C. HOLMES.

106 On or about January 16, 1911, and prior to the sheriff's sale had herein, an agreement was made between S. C. Holmes, representing the plaintiff, A. E. Hess, and W. E. Hogueland, representing defendant, E. S. Conway, with reference to said insurance. Abstract, page- 9 and 21; counter abstract of appellees, page 16.

Said agreement was in substance contained in the stipulation referred to in said affidavits which the said S. C. Holmes claims to have delivered to the said W. E. Hogueland, and caption omitted, is in the words and figures as follows, to-wit:

In the matter of the motion and order heretofore made and served upon defendant E. S. Conway herein with reference to the insurance upon the hotel property in Yates Center, Kansas, it is hereby stipulated and agreed by and between the parties hereto and their attorneys of record that said insurance policies be and remain deposited with the clerk of said court until said insurance is paid; which said insurance money is to be paid to the clerk of said court, and a sum paid to A. E. Hess or his attorney sufficient to pay the balance remaining due upon said judgment above the purchase price of said real estate, and the remainder of said insurance, if any, after the payment of costs and expenses herein, to be paid to E. S. Conway or his attorney.

The judge of said court is hereby authorized by consent of said parties to make an order herein, under date of January 16, 1911, in keeping with said stipulation, and for the protection and guidance of all parties.

Dated this 16th day of January, 1911.

It will be observed from the pages of the abstract above referred to that S. C. Holmes claims that he sent said stipulation to the said Hogueland, Stella M. Holmes claims that she delivered it to him, and W. E. Hogueland claims that something was said about a stipulation and that the conversation took place before the sale of the property at sheriff's sale.

The above shows the efforts made by the said S. C. Holmes to obtain this insurance money for his client, A. E. Hess, had and done prior to the sheriff's sale of said property.

January 19, 1911, sheriff's sale had, and the property sold to the plaintiff, A. E. Hess.

106½ January 27, 1911.

Hon. Oscar Foust, Iola, Kansas.

DEAR SIR: In Hess vs. Conway, I have agreed with the attorney for the defendant for the payment of this money to my client, hence

the matter may be left in its present condition so far as an order is concerned. I am,

Respectfully yours,

S. C. HOLMES.

Dic. S.

107 (Copy of Receipt Made to the Clerk of the Court.)

February 25, 1911.

Received of clerk of court $500.00 to apply on said judgment.

S. C. HOLMES.

S.

108 February 25, 1911.

Mr. A. E. Hess, Oklahoma City, Okla.

DEAR SIR: In yourself vs. Conway, I am pleased to advise you that I have received $500.00 from one of the insurance companies and expect soon to receive a like amount from the other one. This is about a third of the insurance but I think it is all the property is worth and we are doing well to get it. I have retained $50.00 fees and inclose you my check herein for $450.00; will report to you as soon as I receive anything additional and will keep after the matter until I get it all. I am,

Respectfully yours,

S. C. HOLMES.

Dic. S.

109 Hess vs. Conway.

No. —.

S. C. Holmes, Lawyer.

YATES CENTER, KANSAS, Feb. 25, 1911.

Pay to the order of A. E. Hess $450.00 Four Hundred Fifty & no — Dollars.

S. C. HOLMES.

To the Yates Center National Bank, Yates Center, Kansas.

83-250.

[Endorsed:] A. E. Hess.

110 March 1st, 1911.

Mr. S. C. Holmes, Yat-s Cent-r, Kan.

Received yours of Feb. 25 and check of $450 and was glad you got it you *k*keep *rite* after it till you get all He o-es me.

Pleas Keep me Posted wat you thing a Bout the thousand that i throwed of if He Paid me as He agreed to wich He failed to dew you want to get after Him for it and intrest.

Yours respectfully

A. E. HESS.

111 *(Copy of Receipt Given to W. E. Hogueland upon His Paying the Balance of Insurance Money, a.5.)*

YATES CENTER, KANSAS, March 31, 1911.

Received of W. E. Hogueland Five Hundred Seventy Five Dollars in payment of Ins. Conway matter. Apply on judg- Hess vs. Conway.

S. C. HOLMES.

$575.00.

112 April 5, 1911.

Mr. A. E. Hess, Oklahoma City, Okla.

DEAR SIR: In Hess vs. Conway, I am pleased to report that by keeping up a vigorous warfare I have received the balance due on insurance, $575.00; I have retained $25.00 fees and inclose you my check herein for $550.00 in full settlement. I will now go after him for the small balance still on the judgment and the additional he seems to owe you under the contract. I am,

Respectfully yours,

S. C. HOLMES.

Dic. S.

113 Hess vs. Conway.

No. —.

S. C. Holmes, Lawyer.

YATES CENTER, KANSAS, Mch. 31, 1911.

Pay to order of A. E. Hess $550.00 Five Hundred Fifty — no Dollars.

S. C. HOLMES.

To the Yates Center National Bank, Yates Center, Kansas.

83-250.

[Endorsed:] A. E. Hess.

114 *Affidavit.*

STATE OF KANSAS,
County of Woodson, ss:

S. C. Holmes being duly sworn, on his oath says: That he is the attorney of record for A. E. Hess in the above entitled cause.

Affiant further avers that the purported copies of certain papers filed in the District Court of Woodson County, Kansas, hereto attached, are true and correct copies with caption omitted, and in some instances the verification, the originals being on file.

Affiant further avers that the purported copies hereto attached, of letters written by affiant to the said Hess and his attorney, Mr. Johnston, are true and correct copies of letters written at said times

and regularly mailed in the due course of business, manifold copies of the same are in the office files of affiant.

Affiant further avers that the purported letters hereto attached, received from the said Hess and his said attorney, Mr. Johnston, are copies of letters received in due course of business from said parties, the originals of which are on file in affiant's office.

Affiant further avers that he has on file in his office a manifold copy of letters written to J. C. Culver and said insurance company, copies of which are hereto attached, and the same is true with reference to the correspondence had with the Hon. Oscar Foust.

Affiant further avers that the copy of the receipt made to the clerk is hereto attached, and also copy of the receipt made to the said W. E. Hogueland, and that affiant has in his files manifold copy of the stipulation, copy of which is hereto attached.

Affiant further avers that he has the original checks forwarded to the said A. E. Hess, endorsed by the said A. E. Hess, and was returned to the bank upon which they were drawn in this city, with several bank endorsements on the back, and paid in the due course of business; copies are attached hereto showing the endorsement of the said Hess.

S. C. HOLMES.

Suscribed in my presence and sworn to before me this the 20th day of August, 1914.

[Seal of Stella M. Holmes, Notary Public, Woodson Co., Kans.]

STELLA M. HOLMES,
Notary Public.

Commission expires Feb. 10, 1915.

115 EXHIBIT "B."

Certificate.

STATE OF KANSAS,
County of Woodson, ss:

I, Lucy J. Phillips, Clerk of the District Court sitting within and for the county of Woodson and State of Kansas, hereby certify that prior to August 12, 1912, the date of the filing of the motion on behalf of C. F. Harder, in the case of Hess vs. Conway, et al., S. C. Holmes appeared as attorney for C. F. Harder, during the twenty years prior to the date above mentioned, when said motion was filed, in the following cases and no more, to-wit:

1. Case #2720, C. F. Harder vs. Kansas & Colorado Pacific Ry. Co. which was consolidated with case #2719, Therese Harder vs. the same defendant.
2. #2761, C. F. Harder vs. Kans. Colorado & Pac. Ry. Co.
3. #2762, Therese Harder vs. Kans. Colo. & Pac. Ry. Co. revived in the name of C. F. Harder, after death of plaintiff.
4. #2930, C. F. Harder vs. Webb and Conway.

5. #2945, C. F. Harder, et ux. vs. Kans. Colo. & Pac. Ry. Co.
6. #2998, C. F. Harder vs. Yates Center Water, Light & Power Co. et al.
7. #3135, H. F. Abernathy vs. E. T. Browning, et al.

Witness my hand and the seal of said court this 9th day of September, 1914.

[SEAL.] LUCY J. PHILLIPS,
Clerk District Court.

116 *Affidavit.*

STATE OF KANSAS,
County of Woodson, ss:

S. C. Holmes being duly sworn, on his oath says:

With reference to the certificate of the clerk of the court hereto attached, and the cases mentioned therein, affiant desires to state that cases #2720-2761-2762 and 2945 all grew out of matters connected with the condemnation proceedings instituted by The Kans. Colo. & Pac. Ry. Co. in which certain lands owned by C. F. Harder and his wife Therese were condemned.

Case #2762 above mentioned, as will be observed from the certificate, Mr. Harder only became a party by reason of the death of his wife.

In the above litigation against the railroad company all matters in the main were settled and not tried, only one case having gone to the Supreme Court on some phase connected with it.

Case #2930 was tried and appealed to the Supreme Court. Mr. Harder obtained a judgment but appealed it because of other matters in the case.

Case #2998, after pending on the docket of this court for a long time was tried, a judgment rendered against Mr. Harder and the case appealed to the Supreme Court.

Case #3135 was a foreclosure, Mr. Harder was made a party defendant and his appearance entered by affiant, which ended the case so far as Mr. Harder or affiant was concerned.

Further affiant saith not.

S. C. HOLMES.

Suscribed in my presence and sworn to before me this the 15" day of September, 1914.

[Seal of Stella M. Holmes, Notary Public, Woodson Co., Kans.]
STELLA M. HOLMES,
Notary Public.

Commission expires Feb. 10, 1915.

117 [Endorsed:] No. 18792. In the Supreme Court of the State of Kansas. A. E. Hess, et al., Appellants, vs. E. S. Conway, Appellee. Petition of Appellant, S. C. Holmes for Rehearing. *Burch.* C. W. Shinn and Ferry, Doran & Dean, New England Building, Topeka, Kans., Attorneys for S. C. Holmes. Filed Sep. 15, 1914. D. A. Valentine, Clerk.

118 Be it further remembered, that also on the 15th day of September, 1914, there was filed in the office of the clerk of the supreme court of the state of Kansas, the petition for a rehearing of C. G. Harder, which petition for rehearing is in the words and figures as follows, to-wit:

119 In the Supreme Court of Kansas.

No. 18792

A. E. Hess (C. F. Harder and S. C. Holmes, Appellants)
vs.
E. S. Conway et al., Appellees.

Petition for Rehearing on Behalf of C. F. Harder.

Comes now the said C. F. Harder and prays this court to grant him a rehearing in the above entitled case for the following reasons to-wit:

1. Because the court misapprehended the state of facts shown by the record in the case in the following particulars:

This court in its opinion (Advance sheet of Vol. 94, No. 4, page 791) says: "The clerk of the court made the following certificate which was read in evidence."

The certificate in question was not read in evidence for the various sufficient reason that it was not made until the 12th day of February 1914, practically one year after the case was tried. How this certificate got into the abstract is a question the court may well require counsel for Conway to explain. It appears only in the counter abstract filed by these gentlemen at page 11.

This court gives great weight in its opinion to the certificate in question, making it practically the turning point in its consideration of the case so far as this appellant is concerned. While the record shows that this certificate was made on the 12th day of February 1914, doubtless this court overlooked the date of the certificate since it would not expect to find in an abstract of evidence heard upon a trial had in February, 1913, an important item of evidence which was not in existence until the 12th day of February, 1914. It appearing therefore, that the opinion of this court is based largely on statements contained in a certificate which this court understood was read in evidence, whereas, in truth and in fact the same was not in existence at the time of the trial below. It therefore fol-
120 lows conclusively, that a rehearing should be granted, and counsel for the appellant permitted to show to this court how grievously it has misunderstood the facts in this case.

2. This court misapprehended the showing of the record with reference to the employment of Holmes by this appellant. The record does not show that Holmes was employed by the appellant in any capacity relating to matters connected with this litigation, until June 1st, 1911—several months after the controversy between the plaintiff Hess and the defendant Conway with reference to the

appointment of a receiver to insure the property and collect the insurance on the property destroyed by fire in December, 1910. It therefore, appearing by the record in this case that Holmes was first employed as attorney for Harder about the first day of June, 1911. It follows conclusively, that this appellant cannot be charged with notice of any facts which may have come to the knowledge of said Holmes while employed by another client several months before. This doctrine is too thoroughly established to admit of any question whatever.

"It is a general rule that in order for a client to be affected by his attorney's knowledge or notice of facts, such notice must have been acquired in and during the transaction in which the attorney is engaged, and the client will not be chargeable with notice of facts acquired by his attorney prior to the relation of attorney and client or while acting as attorney for another client." 2 R. C. L. p 964-5.

"A party is not chargeable with notice of facts within the knowledge of his attorney where the latter acquired knowledge thereof while acting as the attorney of another party." McCormick vs. Wheeler, Mellick & Co. 36 Ill. 114-85 Am. Dec. 388.

"Knowledge acquired by an attorney in another transaction between other parties does not affect one who subsequently employs him and is not notice to the latter." Martin vs. Jackson, 27 Penn. St. 504-67 Am. Dec 489.

"A purchaser of land is not chargeable with notice of an unrecorded deed thereof by his grantor, by the knowledge of his attorney thereof, acquired before he was employed to purchase the land for such grantee, and while he was representing another person." Scotch Lumber Company vs. Sage, 132 Ala. 598-90 Am. St. Rep. 932.

"An attorney at law whose employment is continuous in no other sense than that he is employed to render such services as his clients may at any time need does not occupy such relation to them that they are charged with knowledge of the dissolution of a partnership, when such knowledge is not gained in relation to any business with which such attorney was employed by such clients." Vietor vs. Spalding, 199 Mass. 52.—127 Am. St. Rep 472.

121 "A notice to the general attorney of a railroad company relating to matters connected with its land department, before any action is brought against the company, is not notice to the land department or to the company unless the general attorney has been given special charge of the subject matter of the notice." A. T. & S. F. R. R. Co. vs. Benton 42 Kan. 688.

Though he was general attorney of the company and the knowledge came to him while general attorney the company was not charged with notice. Then will this court charge a client with knowledge of his attorney, employed for a special and limited purpose, which knowledge was acquired by the attorney while in the employ of another person in a different transaction?

Even in those states which follow the English rule it is held that the knowledge or notice must come to the agent or attorney

who has authority to deal in reference to those matters which the knowledge or notice affects.

"One who employs the attorney for the special purpose of examining an abstract of title to property and giving an opinion thereon, is not chargeable with knowledge of the attorney, acquired in another transaction, of the tendency of a suit which may affect the title to such property." Trentor vs. Pothen, 46 Minn. 298—24 A. S. R. 225.

In this case there is not in the record a syllable of evidence tending to prove that Holmes was employed by appellant Harder to collect the insurance money or redemption money or had any authority whatever with relation to those matters. Holmes was employed by Harder for the sole and special purpose of effecting insurance on the property remaining after the fire and was wholly unconnected with Holmes' previous employment of Hess in regrad to insurance matter. It is conceded that the property had not at that time been redeemed and that Harder owned the certificate of purchase. Whether or not Holmes had made an agreement with reference to redemption of the property was wholly immaterial to the matter in which Holmes was employed.

And even those cases which follow the English rule hold that the rule does not apply where the attorney is interested. In the case of Fairfield Savings Bank vs. Chase, 72 Me. 226—39 A. R. 319, the court in its opinion, referring to the different rules, says:

"Upon this question the authorities disagree. The negative of the question has been uniformly maintained in Pennsylvania and some other states. In the late case of Houseman vs. Building Association, 81 Penn. St. 256, it was said that 'notice to an agent twenty-four hours before the relation commenced is no more notice than twenty-four hours after it ceased to be.' But we think, all things considered, the safer and better rule to be that the knowledge of an agent, obtained prior to his employment as agent, will be implied or imputed notice to the principal under certain limitations and conditions, which are these: The knowledge must be present to the mind of the agent when acting for the principal, so fully in his mind that it could not have been at the time forgotten by
122 him; the knowledge or notice must be of a matter so material to the transaction as to make it the agent's duty to communicate the fact to his principal; and the agent must himself have no personal interest which would lead him to conceal his knowledge from his principal but must be at liberty to communicate. Additional modifications might be required in some cases."

Apply the rule as above stated. Can the court say that the fact was so fully present in the mind of the attorney that he could not have forgotten it? The attorney has never admitted that the alleged fact existed but on the contrary denies under oath that such fact did exist. Was the matter material to the transaction in which the attorney was employed? The attorney was employed for the sole purpose of having a receiver appointed to affect insurance on the property. Whether or not Holmes had made the alleged agreement as to the application of the insurance money was wholly immaterial

to the matter. The property was still unredeemed at that time. Harder then owned the certificate. The property was just as liable to be burned as if the alleged agreement had never been made.

And can the court say that the attorney had no personal interest that would induce him to conceal his knowledge? If he had made and violated an agreement would he not have a personal interest in concealing that fact? If he had sent to Hess money that should have been paid to Harder did he not have an interest in concealing that fact from Harder? Would he not be apt to conceal such fact from Harder? Then will the court hold that there is a conclusive presumption that he did not conceal the alleged facts from Harder?

We have not found any case in which the client was charged with the knowledge of his attorney under facts similar to those of this case.

In Wisconsin it is held that under some circumstances the client may be charged with knowledge gained by his attorney while in the employ of another, but the courts of Wisconsin hold that the client is not charged with notice of a fraud or wrong to which the attorney was a party while employed by another person.

"The whole doctrine of imputed notice to the client or principal rests upon the ground that the attorney or agent has knowledge of something material to the particular transaction, which it is his duty to communicate to his principal. And notice of it will not be imputed to the client where it would be a breach of professional confidence to make the communication; and where the interest in, or relation of the attorney to, the previous transaction is such as would be sufficient to induce him to withhold the information,
123 the presumption of its communication is rebutted. The client will not be charged with notice of a fraud or wrong to which his attorney was a party while employed by another, and which it is quite certain he would conceal." Melms vs. Pabst Brewing Co. 93 Wis. 153—57 Am. St. 899-908.

In this case the court holds that the attorney was guilty of a fraud and wrong in connection with his employment by Hess yet holds that there is a conclusive presumption that he communicated the fact of his own fraud and wrong to appellant Harder; that the attorney was guilty of a breach of duty in one matter but that there is a conclusive presumption that he was not guilty of a breach of duty in another matter; that although the attorney, upon his oath, denies that he was guilty of any fraud or wrong and denies the existence of the facts constituting the fraud and wrong yet that there is a conclusive presumption that he told appellant Harder that he, the attorney, was guilty of fraud and wrong and communicated to Harder the facts showing his guilt.

In its decision in this case the court must have overlooked the fact that appellant Harder acquired his interest long before he employed Holmes for any purpose. We do not think it possible that this court intended to establish the rule that a client is charged with notice of facts which came to the knowledge of his attorney while in the employ of another person in a different transaction, but that by such imputed notice the client is deprived of rights

acquired before he employed the attorney. In this case appellant Harder purchased, paid for, and became the owner of the certificate of purchase on the 19th day of January, 1911. His first employment of Holmes in any matter or for any purpose, after the acquisition of the certificate of purchase, was on the 1st day of June, 1911. At that time Holmes had received and remitted to his client the money that Holmes had received from Conway, the last having been sent to his client on the 31st of March. How could Holmes' knowledge, even if communicated to Harder, affect the rights of Harder acquired more than four months before he employed Holmes?

In order to charge Harder with Holmes' knowledge the court must indulge in two conclusive presumptions. Appellant did not personally employ Holmes, but sent his son F. H. Harder to employ Holmes for the purpose of taking necessary steps to have the property insured. The sole authority possessed by F. H. Harder was to employ Holmes for that specific purpose, and Holmes'
124 authority was limited to the specific purpose for which he was employed. To charge appellant Harder the court holds that there is a conclusive presumption that an attorney, employed for a specific and limited purpose, communicated to an agent employed for a specific and limited purpose facts wholly immaterial to the matter in hand, and another conclusive presumption that such agent communicated the facts to his principal.

If there had been an oral argument, doubtless the court would not have fallen into error as to the facts in this case. However, as it now stands, the decision of this court as applied to the real facts disclosed by the record, is incontestably wrong. A rehearing will afford ample opportunity for arriving at a sound and just decision in this case.

We therefore submit this petition with abiding faith that the same will be granted, and that the appellant will be restored to all the right to which he is entitled by the law of the land.

Respectfully submitted.

C. W. SHINN,
L. S. FERRY,
T. F. DORAN,
JOHN S. DEAN,
Attorneys for Appellant C. F. Harder.

125 [Endorsed:] No. 18792. In the Supreme Court of the State of Kansas. A. E. Hess, et al., Appellants, vs. E. S. Conway, et al., Appellees. Petition for rehearing on behalf of Appellant C. G. Harder. Burch. Ferry, Doran & Dean, New England Building, Topeka, Kans. C. W. Shinn, Attorney or Appellant. Sept. 15 1914.

126 Be it further remembered, that afterward, on Saturday the 14th day of November 1914, the same being one of the regular judicial days of the July term, 1914, of the supreme court of the state of Kansas, before the said court in session at the supreme

court room in the city of Topeka, the following proceeding, among others, was had, and entered of record in words and figures as follows, to-wit:

127 In the Supreme Court of the State of Kansas, Saturday, November 14, 1914.

No. 18792.

A. E. HESS (C. F. HARDER and S. C. HOLMES, Appellants)
vs.
E. S. CONWAY et al., Appellees.

Journal Entry Denying Rehearing.

Now comes on for decision the petitions for a rehearing of this cause; thereupon, it is ordered that said petitions for a rehearing be denied.

128 Be it further remembered, that on the same day to-wit, the 14th day of November, 1914, there was filed in the office of the clerk of the supreme court of the state of Kansas, the syllabus and opinion of the court denying the petition for a rehearing, which syllabus and opinion is in the words and figures, as follows, to-wit:

129 No. 18792.

Appeal from Woodson County.

A. E. HESS (C. F. HARDER and S. C. HOLMES, Appellants)
vs.
E. S. CONWAY et al., Appellees.

Opinion Denying a Rehearing.

Syllabus by the Court.

BURCH, J.

1. The case of In Re Burnette, 73 Kan. 609, 85 Pac. 575, so far as it points out the distinction between original and appellate jurisdiction and the lack of power on the part of the legislature to confer original jurisdiction on this court, followed.

2. Section 580 of the civil code, providing that in all cases except those triable by jury as a matter of right this court may, on appeal, receive further testimony and adopt such procedure as may be necessary or expedient for a full and final hearing and determination of the cause, would be unconstitutional if construed to authorize a prolongation or renewal of the trial of issues of fact in this court on appeal.

3. To save the section from unconstitutionality it must be interpreted merely as providing this court with adequate means for exer-

cising its true appellate jurisdiction. The nature of the court's function is not changed and the scope of its original jurisdiction is not enlarged, but the exercise of its appellate jurisdiction is facilitated by giving it command of aids to review supplemental to the strict record of the cause and sufficient to meet the exigencies of any case.

4. Without the air of a statute this court may, in the ex-
130 ercise of its appellate jurisdiction, avail itself of authentic evidence outside the record to prevent a miscarriage of justice, to avoid a useless circuity of proceeding, to protect its jurisdiction, to protect itself against imposition where the controversy has been settled or for other reason no longer in fact exists, and perhaps under other peculiar and extraordinary circumstances.

5. In this case a trial of the issues of fact occurred in the district court in August, 1912. A rehearing was granted and another trial occurred in February, 1913, when the parties extended their evidence to their own satisfaction. Evidence which was available then and which merely supplements the proof offered in the district court is now tendered to this court. Held, the court is not authorized by section 580 of the civil code to receive and consider the evidence and no occasion exists for departing from the rule that after the district court, which is created and equipped for that purpose, has made a final determination of the issues of fact in a cause, original investigation of such issues is closed.

6. The form of procedure which results in an exercise of the disciplinary power of a court over one of its attorneys is not material to the validity of the order so long as the essentials of fair notice and opportunity to be heard are observed, and in this case it is held that every requirement of due process of law was satisfied.

7. Upon reconsideration of the entire cause the original decision is adhered to.

All the justices concurring.

A true copy. Attest:

____ ____,
Clerk Supreme Court.

131 No. 18792.

The opinion of the court was delivered by

BURCH, *J.*:

Petitions for a rehearing have been filed by Harder and by Holmes. In both petitions complaint is made of the refusal of this court to disturb the findings of the district court upon the facts. Not only is the evidence offered in the district court reargued, but a mass of new evidence is presented here for the first time in an effort to show that the conclusions of the district court concerning the facts should be disapproved. As might be expected if such a practice were tolerated, the witnesses for the appellants carefully fill up the gaps and strengthen the weak places in the case made by their former testimony. Presumably this course is taken pursuant to section 580 of the civil code which reads as follows:

"In all cases except those triable by a jury, as a matter of constitutional right, the supreme court may receive further testimony, allow amendments of pleadings or process, and adopt any procedure not inconsistent with this act which it may deem necessary or expedient for a full and final hearing and determination of the cause."

This court can not consider the new evidence. If it had a thought of doing so it would be obliged to grant the adverse party time to produce countervailing evidence, which might possibly include impeaching evidence. The appellants would then likely desire to make a showing in rebuttal. The result would be that the court would have before it for determination a case which the district court could not identify as one which it had decided, and so this court would be plunged into an exercise of original and not of appellate jurisdiction.

In the case of In Re Burnette, 73 Kan. 609, 85 Pac. 575, the distinction between original and appellate jurisdiction was pointed out as well as the lack of power on the part of the legislature to confer original jurisdiction on this court. The constitution creates the court as it creates the legislature and that instrument, which both the court and the legislature must respect and obey, expressly limited the court's original jurisdiction to proceedings in quo warranto, mandamus, and habeas corpus, and granted to the legislature no power to confer any but appellate jurisdiction. The exceptional and extraordinary character of the court's original jurisdiction becomes apparent when the nature of the proceedings specified in the constitution is considered. A few years before the constitution of Kansas was framed, the supreme court of Wisconsin, discussing this subject, said:

"This class of writs it would seem, appertain to and are peculiarly the instruments of the sovereign power, acting through its appropriate department; prerogatives of sovereignty, represented in England by the king, and in this country by the people in their corporate character, or in other words, the state; and from their very nature, from their peculiar character, functions and objects, to appertain to and approximately belong to the supreme judicial tribunal of the state * * * These writs differ essentially in their character and objects, from ordinary writs issued by the courts in the regular and usual administration of the law between parties. They go to accomplish peculiar and specific objects, carrying with them the special mandate of the sovereign power, addressed to the person, corporation or officer requiring them to do or not to do, to proceed, or to desist, to perform the duty required by law, or to abstain from the exercise of powers without lawful authority, etc. They bear no resemblance to the usual processes of courts, by which controversies between private parties are settled by the judicial tribunals of every grade." (The Attorney General vs. Blosson and others, 1 Wis. 277, 279.)

A few years after the constitution of Kansas was adopted, the supreme court of Missouri, discussing the same subject, said:

"It is very plain that were it not for the express exceptions contained in the constitution, this court could exercise no original

jurisdiction * * * This court was designed to be strictly appellate in its character, duties, and functions, with certain marked and definite exceptions. The framers of the constitution doubtless saw that contingencies might arise when it would not only be fit but indispensably necessary that this court should interpose its process in the first instance. There may be occasions when not only the interests of the citizen, but the safety and welfare of the State, may depend upon the issuance from this tribunal of its original
133 remedial process; and for such exigencies provision was made. Habeas corpus, mandamus, quo warranto, prohibition, etc., are high prerogative writs, emanating from this court by direct application and by the authority of the sovereign power of the State. They are only issued when applied for in a proper case, and are wholly variant from that process of summons or notice by which one party brings an adverse party into court to determine a private right or to settle a matter of ordinary litigation." (Vail, contestor, v. Dinning, contestee, 44 Mo. 210, 214, 215.)

These quotations are sufficient to illustrate the political and legal theory of constitutions like that of Kansas. Indeed there can be no difference of opinion that the true intention was to create an appellate court having power to expound the law, supervise the conducts of inferior tribunals, and correct errors in their proceedings, but with no original jurisdiction except in the extraordinary matters referred to. Neither can there be any difference of opinion that the legislature is powerless to add to that original jurisdiction.

If the statute quoted were to be interpreted as giving this court power on appeal to determine equity cases and others not triable by jury as a matter of right, in the same way that the district court determines them it would be unconstitutional. It must, therefore, be interpreted merely as providing this court with adequate means for exercising its true appellate jurisdiction. The nature of the court's function is not changed and the scope of its original jurisdiction is not enlarged, but the exercise of its appellate jurisdiction is facilitated by giving it command of aids to review supplemental to the strict record of the cause and sufficient to meet the exigencies of any case.

Sometimes the court is in need of extraneous evidence respecting some situation or fact to enable it to determine, not the propriety of the conduct of the district court, but the nature of the judgment to be directed. Sometimes a document, or public record, or other item of evidence of like character, material to a proper determination of the appeal and substantially incontestible, is called for, or is examined if produced, and then is treated in the same way
134 as an admission of the parties would be treated if found in the record. These instances are illustrative and no doubt many occasions will present themselves when it will be important for the court to avail itself of knowledge of some fact not established at the trial in order that it may make just disposition of an appeal.

In the case of Caldwell v. Modern Woodmen, 90 Kan. 175, 133 Pac. 843, Jane Caldwell recovered judgment on a beneficiary certificate issued by the Modern Woodmen of America insuring the life

of her husband, W. H. Caldwell. The proof of death consisted in proof of absence for a sufficient length of time and under such circumstances as to raise a presumption of death. While this court still had possession of the case on appeal, the defendant in the action not only furnished evidence showing that Caldwell was still alive but produced the man himself. The court granted a new trial as to the single issue of death with direction that if the issue were determined favorably to the defendant judgment should be rendered accordingly.

In the opinion it was said:

"This court can not determine, it is true, from the new evidence the question whether Caldwell is living. If that issue is to be retried it must be retried in the district court, but in the exercise of its appellate jurisdiction this court may, and in the very unusual situation presented should, in order to prevent a failure of justice, consider the new evidence, in determining whether a new trial of that issue should be granted. This evidence, uncontradicted as it is, shows that a mistake was made in a finding of a fact essential to support the judgment. In view of the evidence presented at the trial and the whole situation it can not be held that the defendant is precluded from proving the fact that Caldwell is living because of its failure to discover and produce the evidence at the trial. It may be conceded that when the end of orderly judicial processes is reached, an adjudication, although based upon mistake, is final. Still a miscarriage of justice will not be tolerated so long as the court by the use of such processes can apply a remedy." (p. 177.)

The court did not cite the statute quoted above as the foun-
135 dation of its power to prevent a miscarriage of justice under the peculiar and extraordinary circumstances of the Caldwell case. In the case of Ridge v. Manker, 67 C. C. A. 596, 132 Fed. 599, it is said, citing a long list of authorities:

"An appellate court may avail itself of authentic evidence outside of the record before it of matters occurring since the decree of the trial court when such course is necessary to prevent a miscarriage of justice, to avoid a useless circuity of proceeding, to preserve a jurisdiction lawfully acquired, or to protect itself from imposition or further prosecution of litigation where the controversy between the parties has been settled, or for other reasons has ceased to exist." (p. 598.)

Whether the statute might have been invoked in the Caldwell case or not, it can not, consistently with constitutional validity, be construed to authorize a prolongation or renewal of the trial of issues of fact in this court on appeal. The district courts are established and are equipped for the purpose of investigating and determining issues of fact and parties must prepare their cases for trial there. A method of obtaining a continuance is prescribed if a party can not secure his evidence in time for trial when his case is reached. When the trial occurs he may shape his evidence as he desires but he is bound by his choice and can not in the event of defeat better his case by offering more proof or different proof in this court on appeal. In case of accident, surprise, want of fair opportunity to produce evidence, or the discovery of new evidence, a new trial may be ob-

tained upon seasonable application to the district court, but after the tribunal created for the purpose of making final determination of issues of fact has performed that function, original investigation of such issues is closed, and it is no ground for reversal that evidence exists which would have turned the scale in favor of the defeated party if it had been uncovered in the district court.

In this case Harder, by his attorney Holmes, brought on a trial of the issues of fact in August, 1912, and was defeated. The
136 court granted an application for a rehearing and another full trial occurred in February, 1913, when the parties extended their evidence to their own satisfaction. The appellants were then in communication with Hess and took his affidavit to be used as evidence at the second hearing. Every other witness whose testimony is offered here was a witness at that hearing, all the evidence now tendered to this court was available then, the issues now are identical with what they were before, the appellants have twice had a day in court in which to produce their proof, and the controversy over the facts is ended.

It is said that since the case is presented here in substantially the same form it bore in the district court this court should make an independent estimation of the facts, giving due consideration to the action of the district court. That course has been pursued as far as possible, but situations were encountered which the district court was better able to solve than this court.

The question of first importance in the case is how the insurance money was to be applied. Did Holmes and Hogueland agree that it should be applied to satisfy the excess judgment or to the redemption of the real estate? If the agreement were that the insurance money should be applied to redeem the real estate it is idle to contend that Holmes did not have the entire insurance money episode in mind when shortly afterwards he began to represent Harder's interest in the property. The law does not permit him to deny that he performed his duty to his client by divulging the information he possessed, and imputes the knowledge of the attorney to the client precisely as it imputes the knowledge of the agent, C. F. Harder, to his principal. Having knowledge of the facts and having kept silent until after the period of redemption had expired, Harder is estopped from claiming that the last payment, which he suffered Conway to make in the belief that it would effect redemption, did not accomplish redemption.

Holmes and Hogueland are not in accord with respect to the nature of their agreement. This court has before it merely their affidavits, and the rest of the proof. The district court had before it the same affidavits, and the rest of the proof, but the affida-
137 vits were those of two of its regular practitioners with whose conduct and habits of mind it was perfectly familiar. Certainly this court is not qualified to question the weight given the statements of the two attorneys by the district court. It may be noted here that earlier in the same cause Holmes filed, without taking thought, he says, an affidavit very wide of facts of which he had **full personal knowledge.**

In support of Harder's petition for a rehearing the rule is invoked that knowledge of an attorney will not be imputed to his client when the attorney acts fraudulently or is so interested in the transaction that he would naturally withhold the information. There is no indication that Holmes diverted the redemption money for the purpose of personal gain to himself, and the court declines to express itself upon the matter of fraud further than it has already done. If redemption were not effected, Hess would have his judgment paid in full and Harder would have the land. That situation did not necessarily preclude the attorney from speaking.

In the original opinion an ellipsis occurs which makes the court say that the certificate of the clerk, summarizing the appearance of Holmes for Harder shown by the dockets of the district court which were introduced in evidence, was itself read in evidence. The court understood the record, which was without ambiguity. In this connection it may be stated that the court regarded previous employments of Holmes by Harder as unimportant. Indeed the employment in June, 1911, might be left out of account since the judgment is supported by proof that F. H. Harder, the undisputed agent of C. F. Harder, was fully advised, before redemption was completed, of the fact that the insurance money had come into the hands of Holmes.

Holmes still insists that the order upon him to restore to the clerk of the court the redemption money which came into his possession was irregular for informality of procedure. The form of procedure in summary disciplinary proceedings is not controlling so long as the essentials of fair notice and opportunity to be heard are present. In this case Harder's right to a deed depended upon what his attorney's professional conduct had been. That was the primary
138 issue tendered by the motion to require the sheriff to make a deed and the attorney himself filed the motion and brought on the investigation. A trial was had in which all the facts were developed, Holmes and Hogueland gave their versions of the agreement with respect to the application of the insurance money. The money was traced, step by step, from the insurance company through Holmes to Hess. Holmes was necessarily compelled to describe and to defend his conduct and did so by his own testimony and by other evidence which he adduced. The result was that in legal effect he stood before the court as one of its officers who had diverted from its treasury funds arising from the litigation. Then the attorney asked for another hearing which was granted. While on the face of the record he appeared as the attorney for Harder, the substance of the issue still was what the character of his professional conduct had been. The nature of the charge against him had been fully disclosed at the first trial. It appeared in detail and in writing in the affidavits filed in the case. It was that charge which he knew he must meet at the second trial, which he had secured. He had from August of one year to February of the next year in which to prepare. To say that he did not make due preparation would be to impute to him unfaithfulness to Harder. He had command of the case, took such testimony from his former client, Hess, as he desired, and presented such other evidence as he desired, including additional

affidavits of his own. At the final trial he was given full opportunity to defend in his own way and to an extent satisfactory to himself. Consequently every requirement of due process of law has been satisfied and the court was not called upon to go through the ceremonious performance of instituting and prosecuting another proceeding, for the sake of stating the charges, giving notice, and having a hearing, before entering the disciplinary order.

All the matters presented by the petitions for a rehearing have been duly considered by the court and both petitions are denied.

All the Justices concurring.

A true copy. Attest:

——— ———,
Clerk Supreme Court.

139 In the Supreme Court of the State of Kansas.

No. 18792.

A. E. HESS, Appellee (C. E. HARDER and S. C. HOLMES, Appellants),
vs.
E. S. CONWAY et al., Appellees.

I, D. A. Valentine, clerk of said court, do hereby certify that the foregoing pages, numbered from 1 to —, inclusive, are a true, full and complete transcript of the record and proceedings, in the above entitled case, and also of the opinions of the court rendered therein, as the same now appear of record and remain on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Topeka, Kansas, this 11th day of January, A. D. 1915.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

140 Here follows the original petition for a writ of error, and the assignments of error, the original writ of error, and allowance thereof, together with an order fixing the amount of the supersedeas and Stay bond a copy of the supersedeas bond, the original citation with proof of service thereon.

141 Filed Dec. 14, 1914. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of Kansas.

18792.

A. E. HESS (C. F. HARDER and S. C. HOLMES, Appellants)
vs.
E. S. CONWAY et al., Appellees.

Petition for Writ of Error, Assignment of Errors, Prayer.

Considering himself aggrieved by the final decision of the Supreme Court of the State of Kansas in rendering judgment against him, in the above entitled case, the appellant S. C. Holmes hereby prays for a writ of error from the said decision and judgment to the United States Supreme Court, and for an order fixing the amount of a supersedeas bond.

The said appellant assigns the following errors in the records and proceedings in said case:

1. The said Supreme Court of the State of Kansas erred in holding that the rendition of a judgment against the appellant S. C. Holmes, in a case to which he was not a party, and without any process having been served on said appellant, and without any pleadings or notice that any judgment was sought in said case against said appellant, constituted due process of law, and was not a violation of the Fourteenth Amendment of the Constitution of the United States.

For which errors the appellant, S. C. Holmes, prays that the said judgment of the Supreme Court of the State of Kansas, dated the 7th day of July, 1914, be revised and judgment rendered in favor of the appellant, and for costs.

FERRY, DORAN & DEAN,
Attorneys for Appellant.

142 STATE OF KANSAS,
Supreme Court, ss:

Let writ of error issue as prayed for in the foregoing petition upon the execution of a bond by appellant S. C. Holmes to the appellee E. S. Conway, in the sum of $2500.00. Such bond when approved to act as a supersedeas.

Dater 14th December, 1914.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of Kansas.

[Endorsed:] 18792. A. E. Hess, (C. F. Harder & S. C. Holmes, Appellants) v. E. S. Conway, et al., Appellees. Petition for Writ of Error & Allowance thereof & Assognments of Error. Filed December 14, 1914. D. A. Valentine, Clerk Supreme Court.

143 18792.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

[SEAL.]

The President of the United States of America to the Honorable the Judged of the Supreme Court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of the state of Kansas in which a decision could be had in the said suit between A. E. Hess (C. F. Harder and S. C. Holmes, appellants) and E. S. Conway, et al, appellees, wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the right and privilege specially set up or claimed under such clause of the said Constitution; a manifest error hath happened, to the great damage of S. C. Holmes, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do comand you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what or right, and according to the laws and customs of the United States, should

144 be done.

Witness The Honorable Edward D. White, Chief Justice of the United States, the 14th day of December, 1914.

[Seal of District Court U. S., District of Kansas.]

[SEAL.] MORTON ALBOUGH,
Clerk of the United States District Court for the District of Kansas.

Allowed, December 14th, 1914.
W. A. JOHNSTON,
Chief Justice, Supreme Court of Kansas.

Service of the within writ of error, and receipt of copy thereof, is hereby admitted this — day of December, 1914.

——— ———,
———,
Attorneys for E. S. Conway, Defendant in Error.

[Endorsed:] 18792. Holmes vs. Conway. Writ of Error. Filed Dec. 15, 1914. D. A. Valentine, Clerk Supreme Court.

145 *Bond.*

S. C. Holmes, Plaintiff in error.
E. S. Conway, Defendant in error.

Know all men by these presents That We, S. C. Holmes as principal, and F. H. Harder as sureties, are held and firmly bound unto E. S. Conway in the sum of $2500.00; for the payment of which well and truly to be made, we bind ourselves jointly and severally, firmly by these presents.

Sealed with our seal and dated this 29th day of December, A. D. 1914.

Whereas The above named plaintiff in error seeks to prosecute his writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme by the Supreme Court of the State of Kansas.

Now therefore The condition of this obligation is such that if the above named plaintiff in error shall prosecute his wit of error to effect, and answer all costs and damages that may be adjudged, if he shall fail to make good his plea, then this obligation shall be void, otherwise it shall remain in full force and effect.

S. C. HOLMES, *Principal.*
F. H. HARDER, *Sureties.*

146 STATE OF KANSAS,
County of Woodson, ss:

S. C. Holmes and F. H. Harder each being duly sworn upon oath, deposes and says, that he is worth the sum of $2500.00 over and above all debts and liabilities and exemptions.

F. H. HARDER.
S. C. HOLMES.

Subscribed and sworn to before me this 30 day of December, 1914.
[SEAL.] STELLA M. HOLMES,
Notary Public.

Com. expires Feb. 10, 1915.

Bond approved and to operate as supersedeas dated this 2d day of Jan. 1915.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of the State of Kansas.

Endorsed: 18792. Hess, v. Conway. Bond for Stay & Supersedeas. Filed Jan. 1, 1915. D. A. Valentine, Clerk Supreme Court.

147 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to E. S. Conway, Greetings:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington D. C. within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Kansas, wherein S. C. Holmes is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, shall not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, Chief Justice of the Supreme Court of the State of Kansas, this 14" day of December, A. D. 1914.

[Seal Supreme Court, State of Kansas]

W. A. JOHNSTON,
Chief Justice of the Supreme Court of Kansas.

Attest:
D. A. VALENTINE,
Clerk of the Supreme Court of Kansas.

15th day of December, 1914.

Service of the above citation is hereby acknowledged, and our appearances in the Supreme Court of the United States are hereby entered.

LAMB & HOGUELAND,

Attorneys of Record for E. S. Conway, Def't.

[Endorsed:] 18792. Citation. Filed Jan. 1, 1915. D. A. Valentine, Clerk Supreme Court.

148 SUPREME COURT,
State of Kansas, ss:

I, D. A. Valentine, clerk of the said court, do hereby certify that there was lodged with me as such clerk on December 15th, 1914, in the case of A. E. Hess, appellee v. E. S. Conway, et al, appellants:—

1. The original bond of which a copy is herein set forth:

2. Three copies of the writ of error, herein set forth,—one for each defendant in error and one to file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Topeka, Kansas, this 11th day of January, A. D. 1915.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

149 UNITED STATES OF AMERICA,
Supreme Court of Kansas, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Kansas, in the city of Topeka, this 11th day of January, A. D. 1915.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

Endorsed on cover: File No. 24,537. Kansas Supreme Court. Term No. 335. S. C. Holmes, plaintiff in error, vs. E. S. Conway. Filed January 28th, 1915. File No. 24,537.

2

Office Supreme Court, U. S.
FILED
APR 20 1916
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

No. 335.

S. C. HOLMES, *Plaintiff in Error,*

v.

E. S. CONWAY, et. al. *Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

LEONARD S. FERRY,
THOMAS F. DORAN,
JOHN S. DEAN,
Solicitors for Plaintiff in Error.

CRANE & CO., TOPEKA

INDEX.

	Page
Statement	1
Assignment of Errors	7
Points and Authorities	9
Argument	10

CITATIONS.

37 Cyc. 530	9
4 Cyc. 975	9
In Re Wall, 27 U. S. (L. Ed.), 552	9
Jefferie v. Laurie, 23 Fed. 786	9
Lynde v. Lynde, 58 L. R. A. 471	9, 19
Galpin v. Page, 85 U. S. 368	9, 15
Union Bldg. & Savings Ass'n v. Soderquist, 87 N. W. (Ia.) 432	9
Simon v. Croft, 182 U. S. 427	9, 10
Rees v. City of Watertown, 19 Wall. 107, 122, 123	9, 13
Iowa Central Rly. Co. v. Iowa, 160. U. S. 389	9, 14
Davis v. Board of County Commissioners, 65 Minn. 310 (33 L. R. A. 432)	9, 10
Kuntz v. Sumpton, 2 L. R. A. (Ind.), 655 and notes	9, 10
Davidson v. New Orleans, 96 U. S. 97	9
Words & Phrases, Vol. 3, pp. 2244, 2245	9
Hooker v. Los Angeles, 188 U. S. 318	9, 10, 15
Louisville & Nashville R. R. Co. v. Schmidt, 177 U. S. 230	10, 15
Slaughter House Cases, 16 Wall. 36	10, 16
Consolidated Steel & Wire Co. v. Murray, 80 Fed. 821	10
Ex Parte Burr, 9 Wheat. 922	10, 16
Bouvier's Law Dictionary, Vol. II, 15 Ed., page 683	12
Vol. 20 Encyc. Pleading & Practice, 1073	12
Fed. Statutes Annotated, Vol. 9, page 440	14
Weeks on Attorneys at Law, page 149	16
Anderson v. Butler, 15 R. I. 443	19
In Re A Solicitor, 2 K. B. 539	19
In Re Grey, 2 Q. B. 440-443	19

IN THE

Supreme Court of the United States

No. 335.

S. C. HOLMES, *Plaintiff in Error,*

v.

E. S. CONWAY, et. al. *Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

I.

STATEMENT.

This was an action brought originally in the District Court of Woodson County, Kansas, on September 14th, 1910 (Record, p. 7), for the foreclosure of a mortgage upon two tracts of land—one in Yates Center, Kansas, and the other in Durand, Kansas, all in Woodson County—in which action A. E. Hess was plaintiff and E. S. Conway, *et al.*, were defendants.

Service was duly made upon the defendants, and on October 1st, 1910, a motion was filed by plaintiff asking for the appointment of a receiver to insure the buildings situated on the real estate being foreclosed. This motion was denied on the same date. (Rec. p. 8.)

On November 16th, 1910, a personal judgment was rendered in said action against said E. S. Conway for the sum

of $2,612.00, with interest at the rate of ten per cent per annum from the date of said judgment, and a further judgment was rendered for the foreclosure of a mortgage on said real estate. (Rec. p. 15.)

On November 23rd, 1910, another motion was filed for the appointment of a receiver to insure the buildings on said real estate. This motion was overruled on the same date. (Rec. p. 8.)

On December 4th, 1910, an order of sale was duly issued on said judgment (Rec. p. 15) and said real estate was duly advertised for sale on January 19th, 1911. (Rec. p. 15.)

On December 30th, 1910, the buildings on the real estate in Yates Center, Kansas, were destroyed by fire. (Rec. p. 8.)

On January 7th, 1911, on the application of plaintiff Hess, the court made an order enjoining defendant Conway from in any manner disposing of any insurance policies upon the buildings on the mortgaged premises, or any money that he may have collected on any such policies, but that he hold the same to abide the further order of the court, and directed that the motion of plaintiff be heard at Chambers on Monday, the 16th day of January, 1911. Said order was duly served on defendant Conway. (Rec. p. 62.)

On January 16th, 1911, S. C. Holmes, attorney for A. E. Hess, and W. E. Hogueland, attorney for defendant Conway, realizing that said property would not sell for enough to satisfy said judgment, stipulated and agreed that said W. E. Hogueland should collect the money on said insurance policies, and pay a sufficient sum to A. E. Hess, or his attorney S. C. Holmes, to pay the balance remaining due upon said judgment above the purchase price of said

real estate. And further stipulated, that the Judge of said court was authorized to make an order, under date of January 16th, 1911, in keeping with said stipulation. (Rec. p. 11.)

On January 27th, 1911, S. C. Holmes wrote a letter to the Judge of said court, stating in substance: "I have agreed with the attorney for the defendant for the payment of this money to my client, hence the matter may be left in its present condition so far as an order is concerned." (Rec. pp. 63, 64.)

On January 19th, 1911, said real estate was sold to plaintiff A. E. Hess for $1,700.00 (Rec. p. 15.); and on the same date a certificate of sale was issued to said Hess, and said certificate of sale was assigned on the same date to C. F. Harder. Said C. F. Harder paid the sum of $1,700.00 to said Hess for the assignment of said certificate of sale. (Rec. p. 9.)

On February 6th, 1911, said sale was duly confirmed by the court. (Rec. p. 9.)

On February 24th, 1911, said W. E. Hogueland paid $500 to the clerk of the court, and a receipt was taken as follows:

"Yates Center, Kansas, Feb. 24, 1911.

Received of Lamb & Hogueland, the sum of $500.00, the same being in part payment of the redemption in the above entitled cause.

Lucy J. Phillips."

On February 25th, 1911, Stella M. Holmes (a sister of said S. C. Holmes) collected said $500.00 from the clerk, and receipted for the same as follows:

"February 25, 1911.

Received of clerk of court $500.00, to apply on said judgment.

S. C. Holmes.

S." (Rec. p. 18.)

On February 25th, 1911, said $500.00, less a fee of $50.00, was sent to said plaintiff A. E. Hess. (Rec. p. 64.)

On March 31st, 1911, said W. E. Hogueland delivered to said S. C. Holmes a draft for the sum of $575.00 from the insurance Company, payable to the order of E. S. Conway, S. C. Holmes, and A. E. Hess, the same having been endorsed by said Conway, who received from said Holmes a receipt as follows (Rec. p. 11):

"Yates Center, Kansas, March 31, 1911.

Received of W. E. Hogueland Five Hundred Seventy-Five Dollars in payment of Ins. Conway matter. Apply on judg. *Hess v. Conway*, $575.00.

S. C. Holmes."

On April 5th, 1911, said Holmes sent said sum of $575.00 less $25.00 attorney's fee to A. E. Hess. (Rec. p. 65.)

On July 15th, 1912, defendant Conway paid to the clerk of said court the sum of $738.03, thereby attempting to redeem said real estate from said sale. (Rec. p. 26.)

On August 12th, 1912, C. F. Harder, the purchaser of said certificate of sale, for the first time appeared in said action and filed his motion in said court, asking for an order requiring the sheriff of said county to execute to him a deed for said real estate. S. C. Holmes signed said motion as his attorney. (Rec. pp. 9, 10.)

A hearing was had upon said motion on August 30th,

1912, and the same was overruled by the court, and said C. F. Harder was granted three days within which to file his application for a rehearing of said motion. (Rec. pp. 2, 3.)

On August 30th, 1912, said C. F. Harder filed in said court his application for a rehearing on said motion. (Rec. p. 17.)

On February 17th, 1913, said motion was heard and taken under advisement by the court until April 30th, 1913, when the same was overruled by said court. (Rec. pp. 4-6.)

In overruling said motion, the court made the following finding, and rendered the following judgment, as against said plaintiff A. E. Hess, who was a non-resident of Kansas, and was not in court either in person or by attorney, and against S. C. Holmes (Rec. p. 5):

> "And further finds that in justice and equity, it should be ordered and directed that within thirty (30) days from this date, to wit: April 30th, 1913, A. E. Hess, plaintiff in the above entitled action and S. C. Holmes, his attorney of record, be ordered and directed to return to and deposit in the office of the clerk of this court, the sum of One Thousand and Seventy-five ($1,075.00) Dollars, together with interest upon Five Hundred ($500.00) Dollars thereof at the rate of ten (10%) per cent from February 25th, 1911, to day of payment of same into the office of the clerk of this court; and upon Five Hundred and Seventy-five ($575.00) Dollars thereof, interest at the said aforesaid rate, from March 31st, 1911—being the date of payment of same to said S. C. Holmes—to the time such moneys are paid into the office of the clerk of this court pursuant to order herein made, for the use and benefit of the holder of such certificate of purchase, to wit: C. F. Harder.
>
> "It is further considered, ordered, adjudged and decreed, that the plaintiff A. E. Hess and S. C. Holmes, his attorney of record, within thirty (30) days from

this date, to wit: (April 30th, 1913) on or before the thirtieth (30th) day of May, 1913, return to and deposit in the office of the clerk of this court, the sum of One Thousand and Seventy-five ($1,075.00) Dollars, together with interest at the rate of ten (10%) per cent per annum upon Five Hundred ($500.00) Dollars thereof, from the 25th day of February, 1911, down to the day upon which they pay the said sum into the office of the clerk of this court; and upon the sum of Five Hundred and Seventy-five ($575.00) Dollars thereof, with interest from March 31st, 1911, down to the day such sum is paid into the office of the clerk of this court at the aforesaid rate, such moneys so deposited in connection with the Seven Hundred and Thirty-eight and three one-hundredths ($738.03) Dollars now still on deposit in the office of the clerk of this court aforesaid as redemption money to be used in the redemption and cancellation of certificate of purchase issued by the sheriff of Woodson County, Kansas, to A. E. Hess, plaintiff herein."

Said order was made without any application therefor on the part of said defendant Conway, or said C. F. Harder, and without any notice to said Hess or said Holmes that such action was being considered by the court.

Said C. F. Harder and S. C. Holmes each separately appealed from said decision of the court to the Supreme Court of the State of Kansas. (Rec. pp. 1, 2.)

The Supreme Court on July 7th, 1914, affirmed the judgment of the court below. (Rec. pp. 34-41.)

A petition for a rehearing was duly filed by S. C. Holmes. (Rec. p. 42.) And also by C. F. Harder. (Rec. p. 68.)

On November 14th, 1914, said petitions for rehearing were denied by the Supreme Court. (Rec. pp. 73-80.)

In his petition for a rehearing, said S. C. Holmes stated among other things, as follows (Rec. p. 42):

"The Supreme Court. . . . has affirmed a judgment rendered against this petitioner in a suit to which he was not a party, in which no service of any process, notice or demand of any kind was made upon him, in which no petition, motion, affidavit, or any other pleading, alleging any facts against, or asking any judgment or relief against this petitioner, was filed in said cause, in which no hearing, trial, or other procedure was had through which this petitioner has had his day in court, and in which no competent evidence was introduced, and no opportunity given this petitioner to cross-examine any witnesses. That by reason thereof, the judgment rendered and affirmed herein is in violation of the 14th Amendment of the Constitution of the United States, which provides that: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'"

The Supreme Court in overruling said petition for a rehearing filed by S. C. Holmes, used the following language (Rec. p. 74):

"6. The form of procedure which results in an exercise of the disciplinary power of a court over one of its attorneys is not material to the validity of the order so long as the essentials of fair notice and opportunity to be heard are observed, and in this case it is held that every requirement of due process of law was satisfied."

II.

ASSIGNMENTS OF ERROR.

1. The Supreme Court of the State of Kansas erred in holding that the rendition of a judgment against the appellant S. C. Holmes in a case to which he was not a party, and without any process having been served on said appel-

lant, and without any pleadings, or notice of any judgment was sought in said case against said appellant constituted due process of law, and was not a violation of the 14th Amendment of the Constitution of the United States.

2. The Supreme Court of the State of Kansas erred in holding that the judgment of the court below constitutes due process of law, and that said S. C. Holmes had his day in court.

3. The court below erred because its judgment violated the Fourteenth Amendment of the Constitution of the United States, which provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws." And the Supreme Court erred in affirming said judgment.

4. The judgment of the Supreme Court of the State of Kansas violated the Fourteenth Amendment of the Constitution of the United States, because it affirmed a judgment which was rendered against S. C. Holmes, in a suit to which he was not a party, in which no service of any process, notice or demand of any kind was made upon him, in which no petition, motion, affidavit, or any other pleading, alleging any facts against, or asking any judgment or relief against him was filed in said cause, in which no hearing, trial, or other procedure was had through which said S. C. Holmes has had his day in court, and in which no competent evidence was introduced, and no opportunity given said S. C. Holmes to cross-examine any witnesses.

III.

POINTS AND AUTHORITIES.

1.

The Supreme Court of Kansas affirmed the judgment of the District Court on the ground that summary proceedings may be employed in enforcing claims against attorneys for acts done in a professional capacity. Summary proceedings must be based upon notice, and the party must be apprised of the nature and purpose of the proceedings, and have an opportunity to be heard.

37 Cyc. 530.

4 Cyc. 975.

In re Wall, 27 U. S. (L. Ed.) 552.

Jefferie v. Laurie, 23 Fed. 786.

Lynde v. Lynde, 58 L. R. A. 471.

Galpin v. Page, 85 U. S. 368.

Union Bldg. & Savings Ass'n v. Soderquist, 87 N. W. (Ia.), 432.

Simon v. Croft, 182 U. S. 427.

Rees v. City of Watertown, 19 Wall, 107, 122, 123.

Iowa Central Rly. Co. v. Iowa, 160 U. S. 389.

Davis v. Board of County Commissioners, 65 Minn. 310 (33 L. R. A. 432).

Kuntz v. Sumpton, 2 L. R. A. (Ind.), 655, and notes.

Davidson v. New Orleans, 96 U. S. 97.

Words & Phrases, Vol. 3, pp. 2244, 2245.

Hooker v. Los Angeles, 188 U. S. 318.

2.

The judgment affirmed by the Supreme Court of Kansas was rendered against S. C. Holmes without due process of law, as required by the Fourteenth Amendment of the Constitution of the United States, as no notice was given him, and no adequate opportunity to defend was afforded him.

Louisville & Nashville R. R. Co. v. Schmidt, 177 U. S. 230.

Simon v. Craft, 182 U. S. 427.

Davis v. Board of County Comm. 65 Minn. 310; 33 L. R. A. 432.

Kuntz v. Sumpton, 2 L. R. A. 655, and notes.

Hooker v. Los Angeles, 188 U. S. 318.

3.

A man's business, occupation, profession, or calling is his property, and is protected and guaranteed by the Constitution of the United States.

Slaughter-House cases, 16 Wall, 36.

Consolidated Steel & Wire Co. v. Murray, 80 Fed. 821.

Ex Parte Burr, 9 Wheat. 922.

IV.

ARGUMENT.

The Supreme Court of the State of Kansas, through a misunderstanding of the facts disclosed by the record, and by misconstruction of the law applicable thereto, has af-

firmed a judgment rendered against S. C. Holmes, plaintiff in error, in a suit to which he was not a party, in which no service of any process, notice, or demand of any kind, was made upon him, in which no petition, motion, affidavit, or any other pleading alleging any fact against him, or asking any judgment or relief against him, was filed in said cause, in which no hearing, trial or other procedure was had through which he had his day in court, and in which no competent evidence was introduced and no opportunity was given him to cross-examine any witnesses.

The proceeding in the District Court of Woodson County was a motion on the part of C. F. Harder which required the sheriff to execute a deed to him on a certificate of sale, filed in the case of *Hess against Conway, et al.* The first notice or intimation of any kind that S. C. Holmes, plaintiff in error, had that any action was contemplated against him was when the court rendered judgment in the action. Said judgment rendered against said plaintiff in error, and affirmed by the Supreme Court of the State of Kansas, was in violation of the Fourteenth Amendment of the Constitution of the United States which provides that, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws."

The Federal question was raised on petition for a rehearing by the plaintiff in error, and this question was considered and denied by the Supreme Court of the State of

Kansas. (Rec. pp. 42, 80.) The question being thus seasonably raised, this court has jurisdiction to consider the same. (*Mallett v. North Carolina,* 181 U. S. 589.)

The Supreme Court of the State of Kansas held that the District Court of Woodson County, Kansas, had summary jurisdiction to compel plaintiff in error, who had been attorney for Harder on the motion, and attorney for Hess in the foreclosure proceedings, to restore to the treasury of the court the amount which it was claimed he had diverted, in a proceeding in which he was not a party in which no petition, motion, affidavit or any other pleading was filed against him, or any judgment asked against him, and in which no notice was given him. (Rec. pp. 35-41, 74-80.)

There is no statute in the state of Kansas authorizing summary proceedings against attorneys, and the record in this case discloses that neither the court below nor the Supreme Court cited any statute upon which its judgment was based; nor is it claimed by either of said courts that the judgment is based upon any statute of the state of Kansas.

In Bouvier's Law Dictionary, Vol. II, 15 Ed., page 683, a summary proceeding is defined as follows:

> "A form of trial in which the ancient established course of legal proceedings is disregarded, especially in the matter of trial by jury, and, in the case of the heavier crimes, presentment by a grand jury."

In 20 Encyc. Pleading & Practice, 1073, under the head of "Summary Proceedings" we find:

> "The term 'summary proceedings' as used here,

designates those proceedings before judicial tribunals which are of an immediate, speedy or peremptory nature. Proceedings are said to be summary when they are short and simple in comparison with regular or formal proceedings, from which they usually differ in that they dispense with the aid of a jury."

"While the common law admits of summary procedure in certain instances, such as contempt of court, distress, or proceedings to compel attorneys to pay money over to their clients, yet such proceedings are not, as a general rule, favored by, and are in derogation of the common law, and exist only under the authority of statutory enactments."

A summary proceeding, the same as any other proceeding in a court, is based upon notice, and an opportunity to be heard.

In *Rees v. Watertown*, 19 Wall. 107-125 (22 Law Ed. pp. 76, 77) this court has said:

"This summary proceeding would involve a violation of the rights of the latter. He has never been heard in court. He has had no opportunity to establish a defense to the debt itself, or if the judgment is valid, to show that his property is not liable to its payment. It is well settled that legislative exemptions from taxation are valid, that such exemptions may be perpetual in their duration, and that they are in some cases beyond legislative interference. The proceeding supposed would violate that fundamental principle contained in Chapter 29 of Magna Charta, and embodied in the Constitution of the United States, that no man shall be deprived of his property without due process of law—that is, he must be served with notice of the proceeding, and have a day in court to make his defense. . . . Whether, in fact, the individual has a defense to the debt, or by way of exemption, or is without defense, is not important. To assume that he has none and, therefore, that he is entitled to no day in court, is to assume against him the very point he may wish to contest."

In the case of the *Iowa Central Rly. Co. v. Iowa,* 160 U. S. 389, we find in the syllabus:

> "The Fourteenth Amendment to the Constitution in no way undertakes to control the power of a state to determine by what process legal rights may be asserted, or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice, and affords fair opportunity to be heard, before the issues are decided."

In the opinion, the court states:

> "But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. This being the case, it was obviously not a right, privilege, or immunity of a citizen of the United States to have a controversy in the state court prosecuted or determined by one form of action instead of by another. It is equally evident, provided the form sanctioned by the state law gives notice and affords an opportunity to be heard, that the mere question of whether it was by a motion or ordinary action in no way rendered the proceeding not due process of law within the constitutional meaning of those words."

In 9 Fed. Statutes Annotated, 440, paragraph 6, in designating "due process of law" we find the following:

> "*Notice and Opportunity to be Heard—a. In General.* This clause does not necessitate that the proceedings in a state court should be by a particular mode, but only that there shall be a regular course of proceedings, in which notice is given of the claim asserted, and an opportunity afforded to defend against it. If the essential elements of full notice and an opportunity to defend were present, the United States Supreme

Court will accept the interpretation given by the state court as to the regularity under a state statute of the practice pursued in a particular case."

In the case of *Hooker v. Los Angeles,* 188 U. S. 314, we find the following in the syllabus:

"The Fourteenth Amendment does not control the power of a state to determine the form of procedure by which legal rights may be ascertained, if the method adopted gives reasonable notice and affords a fair opportunity to be heard."

In the case of *Louisville and Nashville R. R. Co. v. Schmidt,* 177 U. S. 230, this court states in the syllabus:

"The due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts, or regulate practice therein; and all its requirements are complied with, provided that in the proceedings which are claimed not to have been due process of law, the person condemned has had sufficient notice, and adequate opportunity has been afforded him to defend."

In the case of *Galpin v. Page,* 85 U. S. 368, this court has held:

"It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court. By which is meant until he has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered."

The Galpin case, *supra,* is very much in point in the case at bar. Plaintiff in error had no notice of any kind until

judgment was rendered in the court below that any action of any nature was contemplated against him. No one was asking for any order against him. The record does not show that there was any suggestion at all that such action was being considered by the court until judgment was rendered. The sole and only question before the court was whether or not a sheriff's deed should be issued to C. F. Harder. On this question affidavits were submitted to the court in favor of the issuance of a deed and against such an order, which would not have been competent in a proceeding against the plaintiff in error.

Chief Justice Marshall, speaking for the Supreme Court of the United States, said, in *Ex Parte Burr,* 9 Wheat. 922:

> "The profession of an attorney is of great importance to an individual, and the prospects of his whole life may depend upon its exercise. The right to exercise it ought not to be lightly or capriciously taken from him."

In the Slaughter House cases, 16 Wall. 36, this court states:

> "A man's business, occupation, profession, or calling, is his property, and is protected and guaranteed by the Constitution of the United States."

In Weeks on Attorneys at Law, page 149, we find:

> "An attorney by his admission as such acquires rights of which he cannot be deprived at the mere caprice of the court, any more than a physician of the practice of his profession, a mechanic of the exercise of his trade, or a merchant of the pursuit of his avocations."

Yet, under the decision of the Supreme Court of Kansas in this case, Mr. Holmes, a member of the bar of the

Supreme Court of Kansas has been condemned without notice or a hearing in his own defense, and without his day in court, under the so-called "summary disciplinary power" of the District Courts of this state announced for the first time through a journal entry prepared by the trial court on his own motion, in a controversy between other parties, and in which the discredited attorney appeared only as attorney for the certificate holder in a motion to require the sheriff to execute a deed. The only evidence introduced by either party to this controversy, outside of the court record, was *ex parte* affidavits; and the universal rule is that even an attorney cannot be tried in a summary proceeding, where properly notified and charged, upon *ex parte* affidavits, for the reason that such *ex parte* affidavits are inadmissible, the lawyer having a right to confront and cross-examine the witnesses produced against him. (*Union Building and Savings Association v. Soderquist, et al.*, 87 N. W. (Iowa) 433.)

That courts have summary jurisdiction over attorneys at law, to enforce honorable conduct and fair dealing between attorney and client, is admitted by all; but such summary jurisdiction is never exercised without giving the attorney notice and a hearing in his own defense, with a right to meet the witnesses against him face to face and to cross-examine them. The procedure in such summary jurisdiction is so well and clearly defined that it should be impossible for courts to be misled relative thereto. Thornton, in his recent work on Attorneys at Law, Volume 1, page 615, Section 358, says:

"The usual practice is to present a verified petition,

asking for a rule to show cause directed to the attorney commanding him to appear at a certain time to answer charges presented, the result sought being an adjudication. In some jurisdictions, however, the practice is regulated by statute, and the local laws must be consulted. Under any form of practice, the original petition must contain every fact essential to the exercise of summary jurisdiction. The petition may, of course, be amended under the usual practice rules. . . . The petition is presented as an independent proceeding, and the pendency of another proceeding is not essential."

"*Same,* Section 349, *Parties.* The proceedings must, of course, be brought on behalf of the client or his agent, or executor, or administrator, etc.

"*Same,* Section 360, *Evidence.* In summary proceedings against attorneys, the evidence on the hearing must be such as is admissible in civil actions, *ex parte* affidavits are inadmissible. The respondent is entitled to the privilege of cross-examining the witnesses produced against him. As the judgment may conclude the right of the attorney without the ordinary procedure in legal controversies, it is essential that the petitioner should establish his cause to the entire satisfaction of the court. And where a demand is a prerequisite to the institution of a proceeding of this nature, the fact that such demand was made must be shown. . . . The attorney may be, and doubtless would be, permitted to show such mitigating circumstances as would have a tendency to exonerate him from proceedings for his punishment, and he is entitled to introduce all proper evidence, etc.

"*Same,* Section 362, *Defenses.* The fact that a proceeding is a summary one does not deprive the attorney of any defense which he might have asserted in an action at law or a suit in equity instituted for the same end.

"Charges and accusations against an attorney must be so clear, specific and circumstantial, that the attorney may know how to defend. General and vague charges are not sufficient. A specification that an attorney took legal papers belonging to the files of the court is too indefinite as a charge. The time must be

> stated and the title of the case should be given. A charge so grave in its nature, and possibly leading to such serious results, must be stated with great particularity." (Weeks on Attorneys at Law (under summary Jurisdiction), p. 156.)

It is apparent from the above quotation that while courts have summary jurisdiction over attorneys practicing at the bar, that summary jurisdiction is never exercised without giving the lawyer notice of the charges lodged against him, appointing a time and place for hearing, and permitting him to meet and cross-examine the witnesses produced against him.

In each case cited by the Supreme Court of the State of Kansas, as shown in its opinion on page 41 of the record, the proceeding was instituted by either a verified petition, or a complaint, or a summons.

In the case of *Lynde v. Lynde,* 58 L. R. A. 471, a verified petition was filed by the complainant, and the party against whom the complaint was lodged was given an opportunity to defend, and did defend.

In the case of *Anderson v. Butler,* 15 R. I. 443, the money was demanded of the attorney, and upon his refusal to pay it, a petition was filed, and asking for an order that the money be deposited with the clerk of the court on or before a day named, and the party appeared and defended.

In the case of *In re A Solicitor,* 2 K. B. 539, the party complaining caused a summons to be issued, and notice was given the attorney, and he appeared and defended.

In the case of *In Re Grey,* 2 Q. B. 440-443, the appellant applied for an order that the solicitor should pay over the amount of the judgment debt to him, and the matter was

referred to a master, and after a hearing, at which the attorney appeared, the order was refused, which was affirmed on appeal by the judge at chambers. The matter was then taken to the Queen's Bench.

It is therefore evident, that no case was cited by the Supreme Court of the State of Kansas in which a judgment was rendered against an attorney without a pleading, or affidavit, or motion of some kind, and without notice, as was done in the case at bar. We have searched the books in vain for such a case. In this case Holmes was not a party to the original action, nor to the motion to require the sheriff to execute a deed. In the original action he was attorney for plaintiff Hess. In the matter of the motion to require the sheriff to execute a deed, he was attorney for C. F. Harder, and was not his attorney in any stage of these proceedings until that time, which was more than eighteen months after the insurance money was collected by him and remitted to plaintiff Hess, and was not his attorney in any matter in connection with these proceedings until sometime in October, 1911, when he filed a motion to require the property to be insured, and to have a receiver appointed.

On the motion to require sheriff to execute deed, he simply gave his *ex parte* affidavit on behalf of Harder, and at no time was he either called upon to defend any charges lodged against him or to answer any accusations orally or written. No demand was made upon him for the money. The record not only does not show Holmes to have been guilty of any misconduct, but, on the contrary, shows that he at all times acted diligently, faithfully and honestly for the protection

of the rights of the client in whose interest he was employed. Holmes was attorney for Hess to foreclose a certain deed admitted to be a mortgage. There were buildings on the land being foreclosed; one of them burned after judgment was rendered, and prior to the sale. The plaintiff Hess, realizing that the property was inadequate to satisfy his judgment of $2,612.00, with interest accruing thereon, began a number of proceedings by motion to compel the insurance of the buildings, and to compel the application of the proceeds of insurance in case of fire, to the satisfaction of his judgment. The first of these motions was filed October 1st, 1910. This motion being overruled, said Hess, through his attorney Holmes, renewed his efforts to secure insurance on the property by again on November 23rd, 1910, filing a motion for the sole purpose of procuring insurance on said property to protect and satisfy his judgment. This motion having been overruled by the court, and one of the buildings having been destroyed by fire, he again on January 9th, 1911, filed a motion in said court to require said defendant Conway to deposit with the clerk of said court the insurance policies upon the hotel at Yates Center, Kansas. All of these proceedings were had prior to the sale. Upon the filing of the latter motion, the Judge of the trial court, on January 9th, 1911, issued a restraining order enjoining the defendant Conway from in any way disposing of the insurance policies on the building on said mortgaged premises, or any money collected thereon, and fixed January 16th, 1911, for the hearing of said motion. On said date an agreement was entered into between W. E. Hogueland, attorney for Conway, and Holmes, attorney for Hess, with

reference to the disposition of the money collected on the insurance policies.

Prior to, and at the time of, the sale of the land, Holmes, Hess and Harder understood that the insurance money was to be applied to any deficiency remaining after the proceeds of the sale had been applied on the judgment, and that it was not to be applied for the redemption of the certificate of sale. This is disclosed by the affidavit of Hess (Record, p. 8); and the affidavit of Holmes (Record, pp. 10, 11); and by the affidavit of Harder filed in the Supreme Court of the State of Kansas, in which he states:

> "Affiant further avers that he heard a conversation on January 19, 1911, between Hess and Holmes with reference to the insurance money on the hotel property in Yates Center, Kansas, which was destroyed by fire, and heard Hess tell Holmes that as soon as the insurance money came to send it to him, and affiant understood that in that way the said Hess was to receive the balance in judgment against said Conway in excess of the $1,700 paid by affiant for sale of certificate."

This affidavit was inadvertently omitted from the transcript, but is certified to by the clerk of the Supreme Court of the State of Kansas, and was forwarded to the clerk of the Supreme Court of the United States.

The receipts executed by Holmes—one to the clerk of the District Court and the other to W. E. Hogueland, atttorney for defendant Conway—stated that the money was to be applied on the judgment. This shows how Holmes understood the matter, and this was notice to Hogueland and Conway that he so understood it.

On pages 54-65 of the record certain evidence with reference to this controversy is set forth, but the Supreme Court,

as shown by its opinion after the petition for rehearing was filed (Rec. pp. 73-80) refused to consider this evidence, as well as the affidavit of C. F. Harder, mentioned above. This evidence shows conclusively the good faith of plaintiff in error, Holmes, and the understanding of C. F. Harder. The fact that this evidence was not considered by the Supreme Court shows the grevious wrong that was perpetrated against Holmes. Had he had his day in court, had he known that any action of any kind or nature was contemplated against him, he could have produced this evidence in the court below, and could have had it considered by the Supreme Court of the State of Kansas, but, not having any notice, and no proceeding having been instituted against him, only such evidence was submitted to the court below as was material to the controversy between Harder and Conway with reference to the execution of a sheriff's deed. It is hard to conceive of a more flagrant case in which a judgment was rendered against a party without due process of law, and which deprived him of the rights afforded him by the Fourteenth Amendment to the Constitution of the United States.

This evidence shows further, that at the time this order was made, plaintiff in error, Holmes, had forwarded all the money received by him, except the fees charged Hess, to Hess; that Hess was not in court, but resided in a foreign state; and that Holmes has been ordered to pay the money to the clerk of the court, which he disbursed to his client in the regular course of proceedings, and in accordance with his understanding, and also that of Hess and Harder, of the agreement.

In conclusion, we desire to most earnestly state to this court, that although the amount in controversy in this case is not large, a great principle is involved. Not only is the professional reputation of plaintiff in error at stake in this case, but every lawyer in the land is entitled to the protection of the Fourteenth Amendment to the Constitution of the United States, and is entitled to have his profession and reputation held sacred until an adequate opportunity has been afforded him to defend. We believe that every man should be secure in his constitutional rights, and we believe further that no one can impartially examine the record in this case without coming to the conclusion that the plaintiff in error never had his day in court.

Respectfully submitted,

LEONARD S. FERRY,
THOMAS F. DORAN,
JOHN S. DEAN,
Solicitors for Plaintiff in Error.

HOLMES *v.* CONWAY.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 335. Argued May 1, 1916.—Decided June 12, 1916.

The due process clause of the Fourteenth Amendment does not control mere forms of procedure in state courts or regulate practice therein.

All the requirements of the due process provision of the Fourteenth Amendment are complied with, provided the person condemned has sufficient notice and is afforded adequate opportunity to defend.

An attorney having obtained certain funds from the clerk of the court, the court in a summary proceeding directed him, after a full hearing to restore the same; on appeal this order was affirmed, and on re-

hearing the attorney set up that he had been denied due process of law by not being given adequate notice or a fair opportunity to defend. *Held* that, as the record does not sustain his contention in those respects, this court cannot say that he has been deprived of a Federal right.

92 Kansas, 787; 93 *Id.* 246, affirmed.

THE facts, which involve the validity under the due process provision of the Fourteenth Amendment of a judgment of a state court, are stated in the opinion.

Mr. Leonard S. Ferry, with whom *Mr. Thomas F. Doran* and *Mr. John S. Dean* were on the brief, for the plaintiff in error:

The Supreme Court of Kansas affirmed the judgment of the District Court on the ground that summary proceedings may be employed in enforcing claims against attorneys for acts done in a professional capacity. Summary proceedings must be based upon notice, and the party must be apprised of the nature and purpose of the proceedings, and have an opportunity to be heard. 37 Cyc. 530; 4 Cyc. 975; *In re Wall*, 107 U. S. 265; *Jefferie* v. *Laurie*, 23 Fed. Rep. 786; *Lynde* v. *Lynde*, 58 L. R. A. 471; *Galpin* v. *Page*, 18 Wall. 368; *Union Bldg. Ass'n* v. *Soderquist*, 87 N. W. Rep. (Ia.) 432; *Simon* v. *Croft*, 182 U. S. 427; *Rees* v. *Watertown*, 19 Wall. 107, 122; *Iowa Central Ry.* v. *Iowa*, 160 U. S. 389; *Davis* v. *Board of Commissioners*, 65 Minnesota, 310; *Kuntz* v. *Sumpton*, 2 L. R. A. (Ind.) 655; *Davidson* v. *New Orleans*, 96 U. S. 97; 3 Words & Phrases, pp. 2244, 2245; *Hooker* v. *Los Angeles*, 188 U. S. 318.

The judgment affirmed by the Supreme Court of Kansas was rendered against plaintiff in error without due process of law, as required by the Fourteenth Amendment, as no notice was given him, and no adequate opportunity to defend was afforded him. *Louis. & Nash. R. R.* v. *Schmidt*, 177 U. S. 230; *Simon* v. *Croft*, 182 U. S.

427; *Davis* v. *Board of Comm.*, 65 Minnesota, 310; *Kuntz* v. *Sumpton*, 2 L. R. A. 655; *Hooker* v. *Los Angeles*, 188 U. S. 318.

A man's business, occupation, profession, or calling is his property, and is protected and guaranteed by the Constitution of the United States. *Slaughter-House Cases*, 16 Wall. 36; *Consolidated Steel Co.* v. *Murray*, 80 Fed. Rep. 821; *Ex parte Burr*, 9 Wheat. 922.

There was no appearance for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Plaintiff in error, Holmes, a lawyer practicing before the courts of Kansas, maintains that judgment has been rendered against him, in a cause where he appeared as counsel, without notice or opportunity to defend, contrary to inhibitions of the Fourteenth Amendment.

Acting for one Hess, he instituted proceedings against defendant in error in the District Court, Woodson County, Kansas, seeking personal judgment on a note and foreclosure of mortgage on real estate. Judgment was rendered November 16, 1910, for $2,612.00; and the sheriff sold the land January 19, 1911, to Hess for $1,700.00, subject to redemption within eighteen months. An assignment prepared by Holmes immediately transferred the certificate of purchase to C. F. Harder, but no public record of this transaction was made until August 24, 1912.

An insured building on the mortgaged property burned shortly before sheriff's sale and, upon motion presented by Holmes, the court made an order "restraining and enjoining the said defendant Conway from in any manner disposing of said insurance policies upon the buildings on said mortgaged premises, or disposing of any moneys

collected." Questions arose concerning validity of policies and following an agreement between Holmes and Hogueland, attorney for Conway, a compromise was effected under which the companies paid $1,075.00—$500.00, February —, 1911, and $575.00, March —, 1911. Conway and his attorney claimed that under the agreement this sum was to be applied towards redeeming the land. Holmes claimed it was to go towards discharging the personal judgment.

On February 24, 1911, $500.00 of the insurance money was paid into court by Hogueland. The clerk gave a receipt reciting, "the same being in part payment of the redemption in the above entitled cause." On the next day this sum was withdrawn by Holmes and, as he claims, remitted to Hess. On March 31, 1911, Hogueland delivered a draft for remainder of insurance money to Holmes, who claims that he remitted proceeds to Hess. Conway paid into court $738.03, July 15, 1912, which, with the $1,075.00 above referred to, made up amount necessary to redeem property sold by sheriff, and the clerk gave him a redemption receipt.

Exactly when Holmes began to represent Harder is not clear—certainly it was not later than June 1, 1911. In August, 1912, Holmes as counsel entered a motion for an order directing the sheriff to convey to Harder the land theretofore sold. Conway resisted, claiming that by paying the necessary sum he had redeemed the property. Solution of the issue presented depended upon professional conduct of Holmes, and his affidavits were put in evidence. The motion was denied; but a rehearing was granted and took place in February, 1913. Additional proofs, including two more of his own affidavits, were offered by Holmes, then present in court, and taken under consideration. April 30, 1913, Holmes still being present, the court denied motion for instruction to sheriff and further "ordered, adjudged and decreed, that the plaintiff A. E.

Hess and S. C. Holmes, his attorney of record, within thirty days from this date, . . . return to and deposit in the office of the clerk of this court, the sum of One Thousand and Seventy-five ($1,075.00) Dollars, together with interest . . . down to the day such sum is paid into the office of the clerk of this court . . . to be used in the redemption and cancellation of certificate of purchase issued by the sheriff of Woodson County, Kansas, to A. E. Hess, plaintiff herein."

Without suggesting to the trial court that he had been surprised or prejudiced because no formal notice had been served upon him or that he wished the order set aside or desired to present additional proof or take any further action whatsoever, and when the thirty days were about to expire, Holmes entered appeals to the Supreme Court of the State for himself and Harder, and on very general assignments of errors, making no mention of Federal right, the controversy was there again presented and considered upon its merits.

Among other things the Supreme Court said (92 Kansas, 787):

"On the eve of the sheriff's sale Holmes and Hogueland, as attorneys for their respective clients, agreed that the insurance money should be applied to the redemption of the land. Hess purchased at the sheriff's sale subject to this condition, and when he assigned the certificate of purchase he and Holmes knew that the insurance money would go to redeem the land and not to satisfy the excess judgment. This is the turning point in the case. Mr. Holmes claims that he understood the agreement with Mr. Hogueland differently. After carefully considering all the strong arguments for his view this court, as already stated, feels that the trial court was best able to determine the matter. The result is that Holmes could draw the first payment of insurance money from the clerk of the court, who had received and receipted for it for redemption

purposes, for the benefit of no one but the holder of the certificate of purchase, who at that time was Harder; and Holmes received the proceeds of the draft for the second installment of insurance money for the benefit of Harder. Soon afterwards Holmes is found in court engaged in the protection of Harder's interests as a holder of the certificate of purchase. Holmes had complete knowledge of all the facts relating to the insurance money. Harder's son and agent, F. H. Harder, was informed that Holmes had received $1075 to apply in redemption of the premises, and Harder himself is non-committal on the subject of his knowledge.

. . .

"On February 24, 1911, Conway through his attorney paid to the clerk of the district court the sum of $500 as redemption money and took the clerk's receipt accordingly. Holmes could rightfully withdraw this money for no purpose unless to pay it to Harder. The draft for $575 which he cashed was redemption money also, and if not paid to Harder ought to be in the hands of the clerk. It is conceded that Harder received none of the money. The order therefore is a summary one made by the court in a pending proceeding to secure restoration to the treasury of the court of moneys arising from the litigation, which the attorney has diverted, p. 796.

. . .

"In the present case the court was acting in its own behalf to secure the return of money belonging in its own custody. By the motion directed against the sheriff filed for his client, Harder, the attorney himself instituted the investigation of his professional conduct. That was the only substantial issue in the case, and he was fully heard, both as a witness and as an attorney, in justification of his course. The evidence which justifies the denial of an order against the sheriff justifies the order against him." P. 797.

A petition for rehearing was presented and considered by the Supreme Court. Therein for the first time Holmes set up a claim under the Fourteenth Amendment. In its opinion denying application, the court said (93 Kansas, 246, 255):

"Holmes still insists that the order upon him to restore to the clerk of the court the redemption money which came into his possession was irregular for informality of procedure. The form of procedure in summary disciplinary proceedings is not controlling so long as the essentials of fair notice and opportunity to be heard are present. In this case Harder's right to a deed depended upon what his attorney's professional conduct had been. That was the primary issue tendered by the motion to require the sheriff to make a deed and the attorney himself filed the motion and brought on the investigation. A trial was had in which all the facts were developed, Holmes and Hogueland gave their versions of the agreement with respect to the application of the insurance money. The money was traced, step by step, from the insurance company through Holmes to Hess. Holmes was necessarily compelled to describe and to defend his conduct and did so by his own testimony and by other evidence which he adduced. The result was that in legal effect he stood before the court as one of its officers who had diverted from its treasury funds arising from the litigation. Then the attorney asked for another hearing which was granted. While on the face of the record he appeared as the attorney for Harder, the substance of the issue still was what the character of his professional conduct had been. The nature of the charge against him had been fully disclosed at the first trial. It appeared in detail and in writing in the affidavits filed in the case. It was that charge which he knew he must meet at the second trial, which he had secured. He had from August of one year to February of the next year in which to prepare. To say that he did not

make due preparation would be to impute to him unfaithfulness to Harder. He had command of the case, took such testimony from his former client, Hess, as he desired, and presented such other evidence as he desired, including additional affidavits of his own. At the final trial he was given full opportunity to defend in his own way and to an extent satisfactory to himself. Consequently every requirement of due process of law has been satisfied and the court was not called upon to go through the ceremonious performance of instituting and prosecuting another proceeding, for the sake of stating the charges, giving notice, and having a hearing, before entering the disciplinary order."

The sole question presented for our determination is whether plaintiff in error has been deprived of a Federal right.

Considering Holmes' position as an officer of the court and patient hearings accorded him, his own testimony and duty to offer in evidence whatever was obtainable and material, his actual presence at every stage of the proceedings, his failure to suggest surprise or desire for any further hearing, the inquiry touching his conduct pending for many months, his perfect acquaintance with all the unusual circumstances including his own liability and looking at the substance and not mere form of things, we are unable to say that he has been deprived of adequate notice or fair opportunity to defend and thereby denied due process of law. The cause undoubtedly presents difficulties not to be ignored; and our conclusion is restricted to the peculiar circumstances before us.

In *Louis. & Nash. R. R.* v. *Schmidt*, 177 U. S. 230, 236, the principles applicable here are announced and applied. "It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its

requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend."

Affirmed.

MR. JUSTICE PITNEY dissents.